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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 303

WILLIAM R. TUCKER, VICE-CONSUL OF RUSSIA AT PHILADELPHIA, PENNSYLVANIA, PETITIONER,

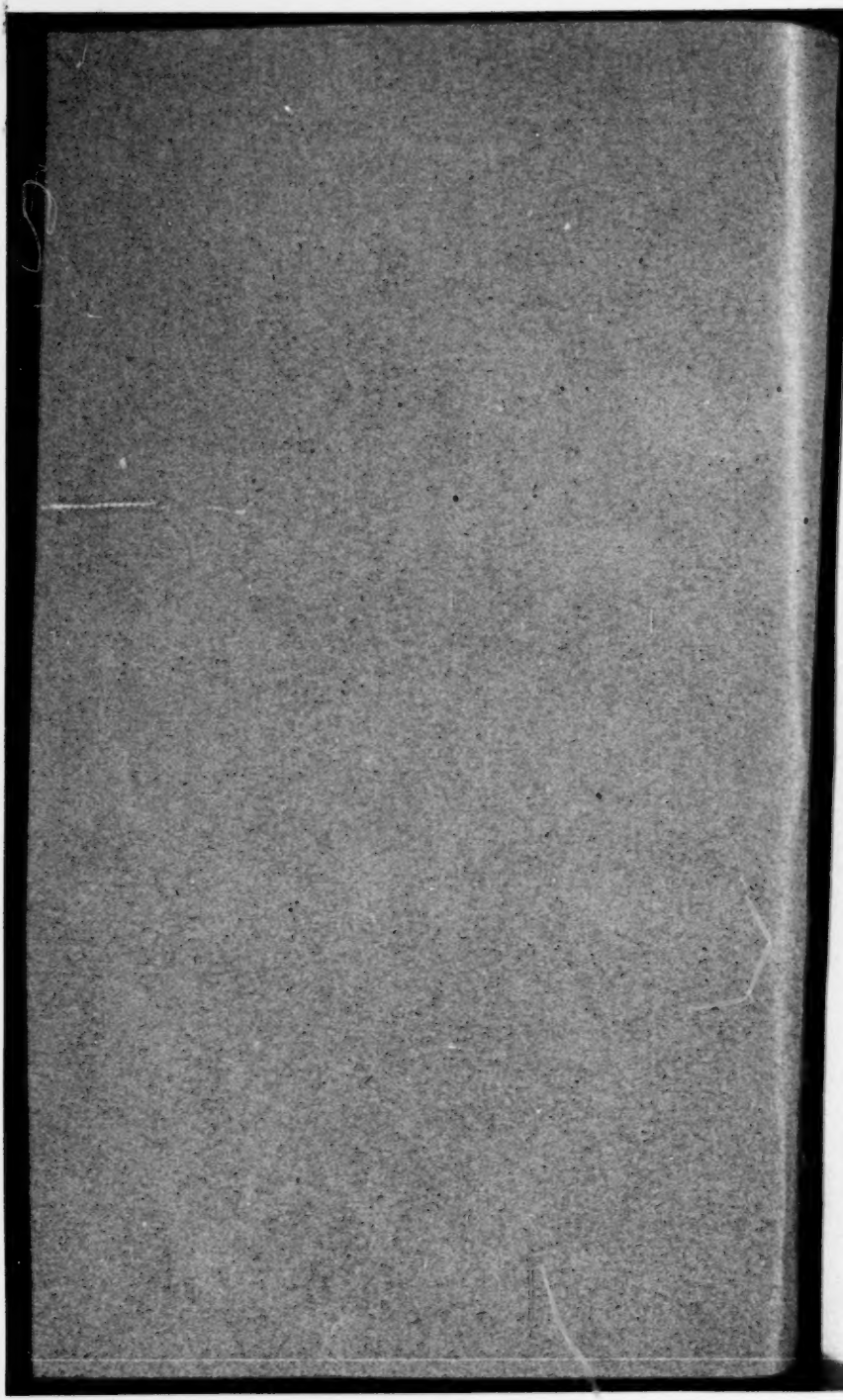
vs.

THE UNITED STATES EX REL. LEO ALEXANDROFF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 22, 1901.
CERTIORARI AND RETURN FILED MAY 4, 1901.

(18,127.)



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a *Transcript of Record.*

United States Circuit Court of Appeals for the Third Circuit, September Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.
} No. —.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

Filed August 21, 1900.

1 In the District Court of the United States for the Eastern District of Pennsylvania, of May Sessions, 1900.

THE UNITED STATES OF AMERICA *ex Rel.* LEO Alexandroff
vs.
ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag."
} *Habeas Corpus.*

Pleas before the honorable the judge of the district court of the United States for the eastern district of Pennsylvania.

It is thus contained:

Be it remembered that on the 18th day of June, A. D. 1900, Bernard Harris, Esq., and Isaac Hassler, Esq., attorneys of said court, come into said court and present the petition of Leo Alexandroff, relator, and the same being filed, is in the words and figures following, to wit:

Petition.

In the District Court of the United States for the Eastern District of Pennsylvania.

Petition of Leo Alexandroff.

To the Honorable John B. McPherson, United States district judge for the eastern district of Pennsylvania:

The petition of Leo Alexandroff respectfully showeth: That your petitioner is unjustly held and detained and illegally confined in Moyamensing prison, in the county of Philadelphia, State of Pennsylvania, upon a warrant issued by United States Commissioner Edmunds, which warrant was issued upon affidavit made by Captain Vladimir Behr, master of the Russian cruiser "Variag," a copy of which affidavit is hereunto annexed.

Your petitioner avers that on the 24th day of May, 1900, at the city of New York, he has declared on oath, before the proper authorities, that *he* is *bona fide* his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty, whatever,
2 and particularly to the Emperor of Russia, of whom he was then a subject.

That your petitioner never deserted the vessel "Variag" and that he never set his foot on that vessel as a seaman thereof.

Your petitioner therefore prays your honorable court to award a writ of *habeas corpus*, directed to Robert C. Motherwell, Jr., the keeper of the said Moyamensing prison and to Captain Vladimir Behr aforementioned, so that your petitioner may be brought before your honorable court; to do, submit to, and receive what the laws may require.

And your petitioner will ever pray, etc.

LEO ALEXANDROFF, *Petitioner.*

CITY AND COUNTY OF PHILADELPHIA, *ss:*

Leo Alexandroff, being duly sworn according to law, deposes and says that the facts set forth in the above petition are true.

LEO ALEXANDROFF.

Sworn to and subscribed before me this 15th day of June, 1900.

ROBERT W. LLOYD,
[SEAL.] *Notary Public.*

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

Captain Vladimir Behr, being duly sworn according to law, deposes and says that he is master of the Russian cruiser "Variag," now at the port of Philadelphia. That Theodor Rushkin, Alexis Guseff, Georg Andrieff, Martin Purin, Gregory Williamson, Leo Alexandroff are duly engaged seamen of said vessel, whose term of service has not expired.

That said Theodor Rushlin, Alexis Guseff, Georg Andrieff, Martin Purin, Gregory Williamson, Leo Alexandroff did, on or before April 25, 1900, and within one year prior thereto, desert from said vessel without any intention of returning thereto.

(S'g'd) VLADIMIR BEHR.

Sworn to and subscribed before me this 26th day of April, A. D. 1900.

[SEAL.] (S'g'd) CHARLES WELSH EDMUNDS.

And thereupon a writ of *habeas corpus*, as prayed for, being allowed by the honorable, the judge of the court, and issued,
3 is, with the return of Robert C. Motherwell, Jr., thereto, in the words and figures following, to wit:

Writ of Habeas Corpus.

UNITED STATES, *Eastern District of Pennsylvania,* } *ss.*:

The President of the United States to Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," Greeting:

We command you, that the body of Leo Alexandroff in prison, under your custody, as it is said, detained by whatsoever names the said Leo Alexandroff may be detained, together with the day and cause of being taken and detained, you have before the Honorable John B. McPherson, judge of the district court of the United States in and for the eastern district of Pennsylvania, at the room of the district court of the United States, in the city of Philadelphia, immediately, then and there to do, submit to and receive whatsoever the said judge shall then and there consider in that behalf; and have you then there this writ.

Witness the Honorable John B. McPherson, judge of said court at Philadelphia, this 18th day of June, A. D. 1900 and in the 124th year of the Independence of the said United States.

[SEAL.] CHARLES S. LINCOLN,
Clerk District Court.

Endorsed: U. S. district court. The United States *ex rel.* Leo Alexandroff *vs.* Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag." *Habeas corpus.* Returnable forthwith. Time appointed for hearing, Wednesday, June 20, 1900, at 10 o'clock a. m. Bernhard Harris, Esq., Isaac Hassler, Esq., attorneys for the relator.

Return to Writ.

To the honorable the judge within named:

I now produce the body of Leo Alexandroff, as commanded by you, for your adjudication, and respectfully submit copy of precept, by virtue of which he is detained in custody.

R. C. MOTHERWELL, JR.,
Supt. Phila. County Prison,
Per JOHN E. SCHAEFER.

June 20, 1900.

4 *Copy of Commitment*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *sct:*

The President of the United States of America to the marshal of said district and to the keeper of the criminal apartment of the Philadelphia county prison, at Moyamensing:

These are to command you, the said marshal, forthwith to deliver into the custody of the said keeper the body of Leo Alexandroff, charged on oath before Henry R. Edmunds, United States commissioner, with desertion from the Imperial Russian cruiser "Variag," and apprehended upon my warrant issued at the request of the vice-consul of Russia at Philadelphia upon the complaint of the captain of said cruiser "Variag" in accordance with the term- of the treaty between the United States and Russia — with the act of Congress in such case made and provided.

And you, the said keeper of the said prison are hereby required to receive the said Leo Alexandroff into your custody in the said prison and — the same safely keep him subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser "Variag," or until he shall be discharged by the due course of law.

Witness the hand and seal of the said commissioner at Philadelphia this first day of June A. D. 1900 and in the 124th year of the Independence of the United States.

Copy.

[SEAL.]

HENRY R. EDMUNDS,
United States Commissioner.

Testimony.

And afterwards, the cause comes on to be heard, and the testimony adduced having been reduced to writing and filed, is in the words and figures following, to wit:

UNITED STATES *ex Rel.* LEO ALEXANDROFF
vs.
ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag." } *Habeas Corpus.*

Hearing before Judge McPherson, U. S. district court, Saturday, June 23, 1900, 10 a. m.

Present: Messrs. Harris and Hassler for the writ; Messrs. Adler and Cheyney, *contra;* Samuel Dickson, Esq., for Mr. Cramp.

5 LEO ALEXANDROFF, being called as a witness, was sworn and examined through the medium of a sworn interpreter.

By Mr. HARRIS:

Q. How old are you?
A. Twenty-one years old.
Q. When did you enter the Russian navy?
A. I entered the service in 1896.
Q. How old were you then?
A. Seventeen years old.
Q. When did you arrive in the United States?
A. The 14th of October, 1899, I arrived in this country.
Q. How old were you then?
A. Twenty years old when I arrived.
Q. What was your position in the Russian navy?
A. I was an assistant physician.
Q. Did you ever have any active service as a seaman?
A. My duty was to attend to the sick.
Q. How did you get here in a Russian or in any other ship, and if any other, in which ship?
A. I came here in a passenger steamer, not a Russian.
Q. What was the name of the steamer?
A. We came in the steamer "St. Paul" from Southampton.
Q. Since you have been in America where have you stopped?
A. I lived together with the crew of the Russian ship that is in process of construction.
Q. Did you live on board the ship or elsewhere?
A. I never was on the ship. I never saw the ship except once.
Q. Did you ever sign any paper as a member of the crew of the cruiser "Variag"?
A. I never signed my name, and I was sent there unwillingly.
Q. Did they ask you whether you would be willing to become a member of the crew of the "Variag"?
A. I was never asked to become a member of the crew, but was simply sent there.
Q. What was your treatment at the hands of the superior officers of the crew since they have been in this country?
A. I cannot say that the superior officer- behaved very well toward me. Insults and undeserved punishments I suffered every day.

Mr. ADLER: Does your honor think this is material, the question as to what treatment he received? It seems to me it is irrelevant.

6 Mr. HARRIS: I think it is relevant, because if the treatment he received at the hands of the superiors of that crew were such as would compel a self-respecting man to leave, he would have a motive for leaving.

The COURT: The question is whether there would be justification.

Mr. HARRIS: It seems to me he would have had justification for leaving and a right to leave. It has never been said that a sailor in the employ of either a government or a private company would have to be subject to all sorts of ill-treatment and not have a right to leave on that account.

The COURT: I do not think that the courts of the United States are called upon to regulate those matters between the masters of foreign vessels and their crews. We cannot regulate their morals and their lives. That is not the ground on which the application is made to the court at all.

Mr. HARRIS: This is simply to throw a side view on the subject.

The COURT: Your position is, as I understand it, that he never was a member of the crew, and therefore did not desert.

Mr. HARRIS: That is it.

Q. When did you leave the crew of the ship?

A. I left the crew on the 20th of April.

Q. Since then where have you been?

A. Since then I lived one week in Philadelphia and then I left for New York.

Q. At the time you arrived in Philadelphia first what was the condition of the ship "Variag"?

A. When I arrived at Philadelphia the "Variag" was not finished.

Q. Where was it? Was it in the water or elsewhere?

A. The "Variag" was then not finished and not in the water. It was in the ship yard.

Q. Was the ship yet on the stocks?

A. It was on the stocks.

Q. Were you ever ordered to go upon board the ship "Variag" and perform any duties as a sailor or as assistant physician?

A. I never received orders to go on the "Variag" either as a sailor or as an assistant physician.

Q. Did you ever see the ship?

A. I saw the steamer "Variag" only while passing by.

Q. During the time that you have been here and that you saw the ship "Variag," did it have the Russian flag floating over it?

Mr. ADLER: If that question is confined to the only time this witness says he saw the "Variag," I have not any objection.

7 But as to whether during the time he was here the flag was flying is another question.

The COURT: It is understood to apply to the time he saw it. The question must be restricted to the time he saw it.

A. I never saw the Russian flag flying on the "Variag."

By Mr. HARRIS:

Q. What flag did it have?

A. I saw the American flag, but not the Russian.

Q. Was the ship "Variag," as far as your knowledge goes, in fact a Russian cruiser, and is it a Russian cruiser now?

The COURT: He cannot state that.

By Mr. HARRIS:

Q. Were you ever told by the captain of the ship that they accepted the vessel, and that you would go on it on a certain date?

A. Nobody told me that this "Variag" was ever going to become a Russian steamer or it was accepted except on general principles. I knew just as well as everybody else in the United States.

Q. When you say it was to become, what do you mean by that? Was it a Russian cruiser at the time, or was it not?

The COURT: You need not go into that. We understand that.

By Mr. HARRIS:

Q. Do you know of your own knowledge whether the Russian government has ever accepted that cruiser?

A. I do not know whether the Russian government accepted the "Variag."

Q. When you left the company of the cruiser "Variag," what was the condition of that cruiser at that time?

A. Although I cannot say in what condition the steamer was, not being used to this country, but I suppose it would take several months yet before it could be completed.

Q. How many months did they say it would take?

A. It was rumored that it would take about two or three months before it would be completed.

Q. After you left Philadelphia for New York, where did you live there?

A. I lived in a room in New York. I rented a room in New York.

Q. What did you do over there?

A. The first two weeks I was without employment and then was employed as a clerk in a lock store.

Q. Do you know anything about this paper? (Declaration of intention shown witness.)

8 A. I know all about this paper. It is a declaration of my intention of becoming a citizen of the United States.

Q. That declaration you made where?

A. I made this declaration in the city of New York.

Declaration of intention dated May 24, 1900, offered in evidence by Mr. Harris.

Mr. ADLER: I object to the paper being offered, on the ground

that the paper shows that the declaration was made after the desertion took place.

The COURT: That is a question as to the effect of the paper. We will receive the paper.

Cross-examination.

By Mr. ADLER:

Q. You received from the Russian government the equipment as a member of the Russian government, did you not?

A. Yes, sir; I received it. I received the equipment not as a member of the crew of a particular steamer, but in a general way as a servant of the Russian government.

Q. It is the custom in Russia in consideration of the education which the subjects receive, that they must serve a certain time in the navy or in the army; is that correct?

A. I had this privilege of serving less time on account of my education.

Q. What is the length of service in your case?

A. Six years.

Q. The subject is not required to sign any enlistment or anything of that kind, is he, but he is simply conscripted and taken into the army or navy?

A. He is simply sent to service without any signature on his part.

Q. When you left Russia to come to this country, you came here with a Russian officer, together with some fifty-three other men?

A. I left Russia in company with fifty-three men and accompanied by one officer.

Q. You knew before you left, did you not, that you were coming here to serve as one of the crew of the Russian cruiser "Variag"?

Mr. HARRIS: I object to the form of the question. It has already been stated by the witness that he knew in a general way he was going to become one of the company of the newly constructed cruiser. That is simply repetition.

The COURT: If that is conceded there is no use asking it again.

Mr. ADLER: I understand it is conceded that at the time he left Russia he knew he was coming here to be a member of this crew.

9 The COURT: That is my understanding of his position.

By Mr. ADLER:

Q. You arrived here some time in October and continued to live with the other members of the crew of this Russian cruiser until you left in April?

A. I lived with the crew all the time from October to April.

Q. Who supported you during that time?

A. I received support from the Russian government, but I claim I did not ask for it. I was simply compelled to serve and compelled to receive the wages.

Q. Did you perform the duties required of you as a member of this crew while you were here between October and April?

A. In so far as it was my place as an assistant physician.

Q. You left the Russian service in April of this year for the purpose of remaining in this country, did you?

A. I left the service in order to become a citizen of the United States and remain here all my life.

Q. Your intention was to obtain a position ashore, was it?

(Objected to as immaterial. Objection overruled.)

A. My intention was to get employment and live here ashore.

Q. While you were here you had your photograph taken with the other members of the crew of the "Variag," did you not?

A. Yes, sir; I had photographs taken.

Q. That is a copy of that photograph, is it not (photograph shown witness)?

A. Yes, sir.

Q. This is your photograph then (indicating)?

A. Yes, sir.

HENRY W. CRAMP, having been duly sworn, was examined as follows:

By Mr. HARRIS:

Q. You are a member of the firm of Cramp & Son?

A. I am an officer of it.

Q. In what capacity are you serving there as an officer?

A. Vice-president.

Q. Do you have any knowledge of the construction of the ship "Variag," for the Russian government?

A. In what respect?

Q. Do you know under what contract it was to be constructed?

A. Truly, yes.

Q. As far as your know, has the Russian government hoisted its flag upon the cruiser?

Mr. ADLER: May it please your honor, it does not seem to me that this question is material. The question whether this is a Russian vessel depends on the contract for its construction, and whether or not the flag was raised does not seem to be at all material.

The COURT: We will hear the facts and determine their effect afterwards.

A. I do not know whether it has been or not. I do not know that it has been or that it has not.

By Mr. HARRIS:

Q. Has the United States flag been taken down from the vessel yet?

A. I do not know that it ever was put up.

Q. Was there not an American flag upon the vessel some time ago?

A. There might have been one hundred times or twenty times I do not know.

Q. You did not see it?

A. No, sir.

Q. You do not know of your own personal knowledge?

A. If I did see it, I would not pay any attention to it. I would not consider it of any consequence.

Q. Is that steamer at the present time in your possession, or is it in the possession of the Russian government?

A. I presume that is a question of law which I am not qualified to answer.

Q. I mean actual possession. Is it in your actual possession or in the actual possession of the Russian government? I am not speaking of legal possession.

A. We have a contract which states the condition and status of ownership in regard to possession.

Q. Are your men still working on that vessel?

A. Yes, sir; many of them.

Q. Has the Russian company, sent here from Russia for the purpose of manning that cruiser, already taken possession of that cruiser?

A. I have no knowledge on that subject.

Q. Have you had your trial voyage?

A. We have had one trial.

Q. Was that trial satisfactory?

A. Satisfactory, yes; to us.

11 Q. Was it satisfactory to the Russian government?

A. I do not know that the Russian government has been heard on the subject. I have heard individual expressions from the Russian officers who were aboard, expressing their pleasure at the result.

Q. That ship was built by the Cramps, right here in the city of Philadelphia?

A. Yes, sir.

Q. Can you tell us what was the condition of the cruiser on the 20th of April, 1900?

A. No; I cannot.

Q. Can you tell us whether it was completed or far from completion on the 20th of April?

A. No; I have an opinion, but I could not say. I did not see her on the 20th of April.

Q. Did you see her at any time immediately preceding or succeeding the 20th of April?

A. Both.

Q. What was the condition of the ship, say two or three days before the 20th of April?

A. It would take a book to describe the condition of the ship. What do you mean exactly?

Q. I mean as far as its completion was concerned.

A. How far was it from completion at that time, or what time?

Q. How far was it from completion at that time?

A. The 20th of April?

Q. You said some date immediately preceding the 20th of April. Say two or three days before that.

A. I was sick abed for a couple of months or confined to the house, and that was all of March and April.

Q. When did you first see the cruiser after you had left your house?

A. Probably the first of May.

Q. What was the condition of the ship on the first of May?

A. It was very nearly completed.

The COURT: As the witness has already said there are many men working on the vessel, I do not see the relevancy of these details. You have the fact now that the steamer has a good many men of the Cramp Company still working on her. That is evidence in itself that she is not now completed, and, therefore, she could not have been completed then.

12 By Mr. HARRIS:

Q. When did the trial take place?

A. I do not know what that date was.

Q. Can you tell us whether it took place before or after the 20th of April?

A. No; I do not know the date.

Q. Under whose auspices was the trial conducted; who had charge of the vessel at the time of the trial?

A. Edwin S. Cramp, superintending engineer of the company.

Q. To your knowledge was there a crew ever organized and on board the cruiser "Variag," and had that crew charge of that vessel?

A. Such matters do not come under my province.

Q. Have you any knowledge of it at all?

A. I necessarily would not acquaint myself with the fact.

Q. I want to know whether you had knowledge?

A. I have not.

Q. Is it a custom with you to send one of your men abroad with a newly constructed vessel in order to deliver that vessel to the country ordering such a vessel?

A. Never.

Q. Where do you generally make delivery?

A. In Philadelphia.

Q. Is there any form attending such delivery?

A. In this particular case?

Q. No; in any case.

A. Yes, sir; there is a form. A ship to the United States Government is delivered to the League Island navy yard.

Q. In reference to foreign countries, what form is in vogue in reference to the delivery?

A. We have had so little experience in building ships for foreign countries that there is hardly a custom established.

Q. There is no custom established?

A. As far as our experience goes.

Q. As an officer of the corporation who built the ship, do you know of your own knowledge whether the Russian navy has a right to reject that ship?

A. I should say she had.

Q. Has the Russian government by and through its officers ever exercised any control over that vessel at all? In other words, is it not a fact that the whole and sole control of the vessel up to the present time is in the hands and in the power of the Cramps?

13 A. That is all described in the contract entirely.

Q. I want you to answer that question if you can. Is it not a fact that the sole control of that vessel is still vested in you as a corporation building that ship? Is not that a fact?

A. I do not know that it is.

Q. It seems to me you ought to know that. You surely ought to know whether the vessel is still in the control of the Cramps or whether it is in the control of the Russian government, and I must insist upon an answer to that question.

A. If there ever occurred a doubt or a question of possession as the owner of any property, I would refer the matter at once to counsel, as we are always well supplied in that respect.

Q. Do you mean to say you do not know whether it is under your control or under the control of the Russian government?

A. I should say while it is for ordinary intents and purposes under our control, yet it is above that under the control of the Russian government.

Q. Do you mean to say that it is actually under your control, as I understand you; that it is actually under your control; only the Russian government has a supervisory power? Is that it?

A. No; I should say that the Russian government has control of it.

Q. That is, they are able to supervise your work? Is not that it?

A. I should say that they could do more than that; that they could compel us to do other things. They could compel us to keep the ship insured.

Mr. DICKSON: He is now asking questions as to legal conclusions. The contract is very full. It seems to me this is a waste of time.

Mr. HARRIS: This is a question of fact, which we want to elicit from the lips of the witness.

The COURT: If the contract provides who shall have the control of the vessel, the contract is to be carried out.

Mr. HARRIS: We want to know who has the physical control.

The COURT: We know that it is in Cramps' custody.

Cross-examination.

By Mr. ADLER:

Q. This cruiser is being constructed by your company under a written contract with the Russian government, is it not?

A. Yes, sir.
Q. Have you a copy of that contract here?
A. Yes, sir.
Q. Is this a copy of the contract? (Copy of contract shown witness.)
14 A. Yes, sir.
A. No, sir.
Q. I understand this to be an exact copy of the contract with the exception that the prices are left out?
A. With the exception of the prices.
Q. This contract provides for certain payments to be made by the Russian government for this vessel as the work progresses. Can you tell me about what percentage of the total cost of the vessel has been already paid by the Russian government?

Mr. HASSLER: I understand this is not the original but a copy of the contract.

Q. Have you the original contract with you?
—. ——.
Q. Is this a copy or the original?
A. That is a copy of the original contract.
Q. Where is the original?
A. The original is in the office of the ship yard.

Mr. ADLER: Mr. Cramp was subpœnaed to produce the original contract by my friend, but, of course, the original contract contains the prices for this vessel between the Cramp Company and the Russian government, and I take it, in a proceeding in which they are not at all interested, that they do not care to disclose the private terms of the contract and Mr. Cramp has produced a printed copy, which is an exact copy, with the exception that the prices are omitted. It seems to me that for the purpose of this hearing, your honor would permit the use of the copy for all the purposes that you would the original.

Mr. HARRIS: We object to the question as put by Mr. Adler, because he refers to certain payments, and the contract prices of the vessel has been excluded from that part to which he referred in his question.

Mr. ADLER: I am not asking as to the amount. I am asking as to the percentage.

Mr. HASSLER: It does seem to me if we are to consider the contracts in this case, we ought to have the full contract.

The COURT: You have no concern with the price.

Mr. HASSLER: It may be very important in determining the question of property.

Mr. DICKSON: They called for a copy and it was produced. If they call for the original, it can be produced. If your honor will look at the contract, you will see the questions of property and title are fully settled by it.

The COURT: The question is a proper one and may be answered.

The following question read to the witness: "This contract
15 provides for certain payments to be made by the Russian government for this vessel as the work progresses. Can you tell me about what percentage of the total cost of the vessel has been already paid by the Russian government?"

A. I should say about eighty per cent.

By Mr. ADLER:

Q. The vessel is afloat in the water, is it not?

A. It is; yes, sir.

Q. She has had her first trial trip, I understood you to say?

A. Yes, sir.

Q. Can you tell me whether she has been baptized in accordance with the forms of the Russian government?

A. I do not know that of my own knowledge. I was ill at the time.

Q. Tell me when the vessel was launched.

A. In the fall of the year. October or November, I am not sure which.

JULIUS GEORGE, having been duly sworn, was examined as follows:

By Mr. HARRIS:

Q. What is your business?

A. Engineer.

Q. Do you know anything about the Russian ship "Variag"?

A. Yes, sir; I know parts of it.

Q. Have you ever seen it?

A. Yes, sir; I saw it from the outside, but they would not let me pass on board.

Q. Who was on board that ship?

A. The American people were working there.

Q. Was there any watch kept by any of the company of Russian sailors that came over here to man that steamer?

A. No. I never heard of it or never saw it.

Q. Did you ever see the Russian flag upon that ship?

A. No, sir.

Q. What flag did you see, if any?

A. I did not see any flag. I was there a couple of days before the trial came off and they raised the American flag, because the ship belonged to the United States, and after the money was paid the ship belonged to the Russian government and under the Russian rules.

Q. When did you last see the steamer?

16 A. About three weeks ago.

Q. Was it completed then, so far as you know?

A. No; not quite complete.

NICHOLAS AGLET, having been duly sworn, was examined as follows:

By Mr. HARRIS:

Q. What is your business?
A. Engineer.
Q. Were you once a member of the Russian navy?
A. Yes, sir.
Q. Do you know anything about the rules in reference to keeping watch on the ship?
A. Yes, sir; I know them.

The rest of the witness' examination was conducted through the medium of a sworn interpreter.

Q. What are the rules with reference to keeping watch on a Russian ship?
A. He must do what the officer will tell him.
Q. Who keeps watch there generally?
A. The captain watches the ship.
Q. That is at sea. Who watches the ship ashore?
A. Some sailors watch the ship.
Q. Do you know anything about the ship "Variag"?
A. Yes, sir.
Q. Did you ever see any of the Russian sailors watch that ship?
A. I never saw the ship but I saw the Russian sailors.
Q. Did you see the ship "Variag"?
A. I saw the ship from a distance passing by.
Q. You know a number of the company, do you not?
A. I know some members of the company.
Q. Did anybody ever tell you he had to go on board?

(Objected to.)

Mr. Adler offered in evidence contract between the Cramp Ship and Engine Building Company and the Russian government; produced and identified by Mr. Cramp.

Mr. Hassler stated that the fact that the contract was a copy was not objected to.

Mr. Adler offered in evidence original affidavit and letter from the imperial Russian vice-consul to the commissioner who committed this defendant and upon which the warrant was issued.

Mr. ADLER: For the information of your honor, I will offer
17 this as well. It shows that the proceedings have been in accordance with the treaty existing between the Russian government and this country, and also in accordance with the provisions of section 5280 of the Revised Statutes.

Mr. Adler also offered in evidence affidavit of Captain Vladimir Behr, dated the 26th day of April, 1900, in which it is alleged that the defendant, together with some other seamen, were duly engaged seamen on the vessel "Variag," whose term of service has not ex-

pired, and that on or before April 25, 1900, within one year prior thereto, — deserted the vessel without any intention of returning thereto.

Mr. Adler offered in evidence letter accompanying the above-offered affidavit, dated April 25, 1900, from William R. Tucker, the imperial Russian vice-consul, to the Hon. Henry R. Edmunds, United States commissioner.

(Letter read.)

Mr. HASSLER: I have no objection to these papers, in so far as they may show that the proceedings were formal, but I do object to them in so far as they may be offered as proof of the facts in the case.

Mr. ADLER: I do not offer them for that purpose. I merely offer them to show that the proceedings have been in accordance with the treaty and the Revised Statutes.

Mr. HASSLER: If the offer is made in that way I shall have no objection to it.

Mr. ADLER: I also have here the Russian officer who accompanied these fifty-three sailors to this country, together with the other members of the crew, who has with him the passport issued by his government entitling these men to come here. I understand it is admitted by the other side that this defendant did come here as a portion of the crew of this cruiser, and the passport so states. If that is admitted, I presume it is not necessary to offer the passport in evidence. If your honor cares to have it, I will produce this officer with the passport and offer it. It merely shows that this defendant, with fifty-two other members of a company in the Russian navy were admitted to free passage here to become members of the crew of the cruiser "Variag," and that he came here in pursuance of that passport accompanied by this officer.

Mr. HASSLER: I should object to the officer, not so much on account of what is in the passport, but my friend made a statement which I do not think is exactly accurate, as to what we stated. We stated this man came here with a company of men, but we do not state that he came here as part of the crew of the "Variag."

The COURT: He came here as a member of the Russian navy, ordered here to become one of the crew of the cruiser "Variag," and he came for that express purpose.

18 Mr. HASSLER: We concede that.

Mr. ADLER: I have also a letter from the acting Secretary of the Treasury Department of the United States permitting the landing of this crew. I have not got the original, I have merely a copy. I understand the original is in the possession of the Russian embassador at Washington. I offer the copy.

Mr. HASSLER: I should like this to go in without objection, but I cannot see what it has to do with the case, and it contains a statement which may prejudice our client's cause, and for that reason I object to it.

The COURT: I will admit it for what it is worth.

Mr. HASSLER: I will withdraw the objection.

Mr. Adler then offered in evidence the letter dated October 4, 1899, signed by the acting Secretary of the Treasury.

(Letter read.)

(Testimony closed.)

After discussion the court stated that it would hold the matter under consideration, giving an opportunity in the meantime for counsel to hand briefs to the court.

"EXHIBIT."

No. 19805.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 4, 1899.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard in Philadelphia, Pennsylvania.

The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case.

Respectfully yours,

O. L. SPAULDING,
Acting Secretary T. U. S.

19 EXHIBIT.

No. 301. *Contract.*

Cruiser for imperial Russian navy.

The Wm. Cramp & Sons Ship & Engine Building Co., Philadelphia, Pa.

Dated April 11/23, 1898.

Cruiser.

This contract entered into this 11/23 day of April, 1898, between The William Cramp & Sons Ship and Engine Building Company of Philadelphia, Pa., United States of America, and hereinafter referred to as the contractors of the one part, and the Russian ministry of marine, in the person of the admiral contractor, Vice-Admiral Verhovsky, of the other part as follows:

General Conditions.

ART. 1. In consideration of the payments to be made, hereinafter mentioned, the contractors agree to supply to the imperial Russian government a protected cruiser built, equipped, armed and fitted, in

accordance with the preliminary specifications and drawings, also annexed, and in all respects equal to the best ships of corresponding type in the United States Navy.

The contractors undertake to provide and stow complete at their own expense, with the exception of the entire ordnance and torpedo outfit, all the stores necessary, and usual for the equipment of a vessel of this class when fitted for sea, in order that the vessel may be handed over to the charge of the persons appointed by the Russian ministry of marine in a condition in all respects (having her live ammunition on board) absolutely ready for immediate service as a commissioned ship, at the time and place hereinafter mentioned.

The contractors also bind themselves to perfectly finish the ship, including all carpenters', joiners', and painters' work, and in every respect fitted and equipped for sea, as described in detail in the specifications, and in general accordance with ships of the latest and similar type. The contractors are not bound to supply personal and consumable stores.

Particulars of the hull, machinery, etc., are given in separate preliminary specifications attached hereto. Final specifications, to be mutually agreed upon, conforming to the preliminary specifications, and following the best modern practice as to details will be prepared after Mr. Charles H. Cramp returns to America, and when signed by the representatives of both parties, the same shall become part of this contract.

Quality of Material.

ART. 2. All the materials to be used in the construction, equipment, and fittings, whether steel, timber, or otherwise, are to be of the best of their respective kinds for their respective uses and shall, in all respects, be such as shall be approved by the board of inspection appointed by the Russian ministry of marine, hereinafter referred to as the board of inspection. The said board of inspection to have permission to see the steel and other materials tested at the makers' works, before they are used in the construction of the vessel. The tensile strength, ductility, and other qualities to be in accordance with the best practice, and the figures shown in the specifications annexed hereto.

Rejected Material.

ART. 3. If any of the materials shall, before being employed in the construction of the vessel, be rejected by the said board of inspection as unfit for the purpose, the same shall be replaced, and the material so substituted shall be subjected to the like inspection, testing and rejection and to all other provisions of this contract, which are applicable thereto.

Inspection.

ART. 4. The board of inspection shall have power, at all times during the continuance of this contract, to inspect the progress of the work, both as regards the material and the construction of the vessel, either continuously, or occasionally, by any inspector or inspectors appointed and by any officers of the imperial Russian service.

The contractors engage that, during the construction and equipment of the vessel, the board of inspection shall have full liberty to enter the premises of the contractors, and any other premises upon which the machinery, parts of the hull, fittings and other appurtenances of the construction shall then be, for the purpose of inspecting the same, and the contractors engage to give every facility within their power, through themselves and all persons employed under or for them, in respect of the vessel, machinery, etc., for the due testing and survey of the materials, mode of construction, and workmanship of the vessel, machinery, etc., and every or any part thereof.

A list of the manufacturers to whom the contractors intend to give orders for materials, different appurtenances, etc., in connection with the said ship shall be previously presented to the board of inspection for approval.

All materials, fittings, and machinery, etc., (armour, plates and hull material excepted) which are to be manufactured outside
21 the contractors' dock yard shall be delivered for testing to the board of inspection at the contractors' dock yard. (It being understood that the plates and hull material shall all be manufactured at one place.)

The contractors undertake to have at their works all the facilities necessary for different tests.

The contractors will further give and supply to the said board of inspection any information they may reasonably require, and all drawings of details which they deem necessary for the inspection of the building or construction of the ship, machinery, etc., or any part or parts thereof.

Detail Working Drawings.

ART. 5. The contractors have also to supply the Russian ministry of marine with a complete set of detail working drawings of the vessel, being duplicates of those used in the construction of the ship, on the condition that the Russian ministry of marine pledge themselves to use the said drawings solely for their own information, and do not, on any pretext whatever, allow them to pass into the hands of other manufacturers.

In addition to the drawings just mentioned the contractors agree to deliver to the board of inspection the detail working drawings showing the important principal plans usually made in the beginning of the work of construction and on which the others are based, and also each and all drawings which shall be required for the construction of the vessel. Each of these drawings is to be delivered to

the board of inspection immediately after it is ready, and a copy of it is to be simultaneously posted to the ministry of marine.

Deviations or Additions.

ART. 6. No additional payment shall be made for deviations or additions of any kind, except in cases where an extra payment shall have been previously agreed to in writing.

If any of the work herein described is not carried out, a rebate of corresponding value is to be allowed to the Russian ministry of marine.

Specifications and Drawings, Engines and Equipment.

ART. 7. The vessel shall be engined and equipped in accordance with the specifications and drawings before mentioned, and signed by the representatives of both parties; and the said specifications and drawings shall be integral portions of the present contract, and everything which may be necessary as an adjunct, or necessary to perfect and complete and make effective everything coming within the scope of the specifications, although not particularly men-
22 tioned, or imperfectly or insufficiently described therein, shall be done, executed, supplied, or furnished by the contractors as if the same had been particularly specified; and the form, style, mode, or principle of construction or execution, materials and workmanship of everything connected with the said ship, whether as regards her hull, engines, machinery, rigging, furniture, and equipments, both fixed and movable, where not particularly specified or detailed, shall be of the very best quality and description, and conform to the best practice.

Speed Trials.

ART. 8. Trials to determine the speed of the vessel shall be made by the contractors, in the presence of the board of inspection, and at the cost of the contractors, who agree to insure the vessel against sea risks and all other risks of every description during the trials, and until such time as the vessel is handed over to the exclusive possession and custody of the Russian ministry of marine.

Preliminary trials under steam are to be made, to insure that the whole of the machinery is in proper working order, and fit for the official trials.

(*a.*) The speed shall be ascertained by a trial at sea of at least four (4) consecutive runs, over a measured base of about ten (10) knots, in deep water, and in a calm sea, with full power, under an air pressure not exceeding 1½ inches of water. From the four (4) runs over the measured base shall be deduced the advance per revolution, from which shall be calculated, in the usual way, the mean speed during two trials of six hours duration each, but between the two trials there shall be no adjustment of parts or cleaning of boilers.

The mean speed determined in this way is to be not less than twenty-three knots per hour.

For each quarter of a knot below the mean speed as above agreed in this contract a penalty at the rate of $50,000 (fifty thousand dollars) per quarter knot shall be deducted from the contract price.

If the mean speed fall below 22 knots but not below 21 knots, for each quarter knot an additional deduction shall be made at the rate of $35,000 (thirty-five thousand dollars) per quarter knot, and if the mean speed fall below 21 knots and not below 20 knots, the Government shall have the right to accept the vessel but at a reduction of $200,000 (two hundred thousand dollars) from the contract price, in addition to what has been deducted before.

(*b.*) Should the mean speed be less than 21 knots per hour, it shall be optional with the Russian ministry of marine to reject the ship.

(*c.*) The consumption of coal should not exceed 2 lbs. per I. H. P. per hour at full power.

A trial to determine the coal consumption to be made, in a manner satisfactory to the board of inspection.

23 (*d.*) Trials of stopping, starting, and reversing from full speed, shall be made as prescribed by the board of inspection.

There shall not be a difference of more than one foot in draft between the bow and the stern on an even keel at the normal draft under normal conditions. The mean draft shall be determined by adding the draft at the stern to the draft at the bow, and dividing the sum by two.

(*e.*) In the trials the ship's draught of water is to be designed normal draught, that is 20 feet, and not materially more, and as much less as possible with all the estimated weights on board, as stated in the specifications. In case of the actual draught of water in any part exceeding the contract draught by one foot it shall be optional on the part of the Russian ministry of marine to reject the ship.

For each inch up to twelve inches by which the actual draught will exceed the above-stated normal draught a penalty shall be deducted from the contract price as follows: For the first six inches nothing, but for each of said remaining six inches $21,000 (twenty-one thousand dollars) per inch.

If the ship should be rejected by the imperial Russian government, either for the deficient speed, or for the excess of draught above named, all payments made in respect of the rejected ship shall, within thirty days thereupon, become repayable, and shall be forthwith repaid, by the contractors to the Russian ministry of marine.

The cost of providing the coal, and loading a quantity of coal and any cargo which may be necessary to be placed on board to represent the estimated weights for the trial for speed, are to be borne by the contractors: but all coal left over the trial shall be purchased, and paid for, by the Russian ministry of marine, at the cost price to the contractors.

Defects After Delivery.

ART. 9. The contractors bind themselves, in case within twelve calendar months after delivery of the vessel there shall be found any important and materially defective workmanship or material, which had been used in the construction or equipment of any importan

part of the hull, engines or machinery, then in such case to replace such defective workmanship and material by correct workmanship and sound material, and to make such repairs at any port in Russia, or elsewhere, possessing the necessary facilities which may be selected by the Russian ministry of marine for that purpose.

Property Clause.

ART. 10. The contractors agree, that the vessel to be built, as aforesaid, whether finished or unfinished, and all steel, iron, timber and other materials as may be required by the contractors, and
24 be intended for the construction of the said ship, and which may be brought upon the premises of the contractors, shall immediately thereupon become, and be, the exclusive property of the Russian ministry of marine. The flag of the imperial Russian government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian ministry of marine may, at any time appoint an officer or officers to take actual possession of the said ship or material, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid.

Firing Trials.

ART. 11. In addition to the speed trial, the firing trial, to test the structure of the vessel, shall be made at sea, and the cost of such further trial, and the insurance of the vessel in respect thereof, shall be defrayed by the contractors. The powder and ammunition for the said trial to be provided by the Russian government.

Insurance.

ART. 12. The contractors shall insure, and keep insured, against all risks usually insured against, the said vessel, its engines, and all fittings and materials at their own cost, but in the name of, and for the benefit of, the Russian ministry of marine, in fire insurance companies previously approved by the board of inspection, and in such an amount or amounts as shall be, from time to time, sufficient to cover and recoup to the imperial Russian government the sum or sums which said government, for the time being, may have paid, or become bound to pay, to the contractors in respect of such vessel.

And the policy or policies of insurance shall, if required, be deposited with the board of inspection, as soon as they are obtained, and any amount recovered, under such policy or policies, shall be applied to repair any damage in respect of which such amount shall be recovered, and the deficiency, if any shall be borne, and paid, by the contractors, who shall make good, at their own expense, all damage in excess of the amount so recovered.

And in default of the contractors so insuring and keeping insured the vessel and depositing the policy or policies if required, it shall be lawful, but not upon the Russian ministry of marine obligatory, to

insure, and keep insured in its own name, but at the cost of the contractors; and the premiums of such insurance, and all cost connected therewith, shall be deducted from the monies due or to fall due to the contractors under this contract, and, failing such deduction, the contractors agree to pay the amount thereof to the Russian ministry of marine.

Notwithstanding anything herein contained, the ship, together with its engines, machinery, and equipment, shall, as between the contractors and the Russian ministry of marine, stand, and at all times be, at the risk of the contractors, until the said ship has been accepted by the imperial Russian government, or it has taken actual possession thereof.

Completion and Delivery.

ART. 13. The contractors engage, at their own cost and risk, to launch and deliver the vessel safe and uninjured at Philadelphia, Pennsylvania, and equipped for sea, into the charge of the persons appointed by the imperial Russian government to receive it, in not more than twenty months, after the arrival of the board of inspection at Philadelphia. But due and reasonable allowance is to be made for any unavoidable delays in the completion of the speed trials, which may arise from unfavorable weather; it is, however, understood that the said allowance shall not exceed one calendar month.

Penalties.

ART. 14. In the event of the vessel not being so completed and delivered within the contract date above mentioned, and save in the case of natural phenomena, such as fire, flood, earthquake, tornado and pestilence, "*force majeure*," or strikes of workmen, the contractors engage to pay the Russian ministry of marine, a sum of one per cent. of the whole contract price, for each month or part of a month of delay.

A corresponding extension of time in consequence of a delay owing to the case of natural phenomena, "*force majeure*," &c., is to be allowed by the board of inspection.

Docking.

ART. 15. The contractors agree to cause the vessel, after final completion, and before the final delivery to the ministry of marine, to be docked and cleaned at their own cost and risk, and at any time should any contingency arise which would, in the opinion of the board of inspection, render it advisable to have the ship placed in dry-dock for survey, before being accepted by the Russian ministry of marine, the contractors are to dock the ship at their own risk and cost.

Russian Government to Have Authority to Complete.

ART. 16. The contractors agree, that in case they shall fail, or be unable, to complete, the said vessel and supply the stores and articles aforesaid, in accordance with the agreement herein contained, then, and from thenceforth, it shall be lawful for the Russian ministry of marine to cause the works herein agreed to be done, and the
26 articles to be completed and supplied by any persons, firm, or company whom the Russian ministry of marine shall see fit to employ, using therein such of the materials as the contractors shall have provided or procured for the purpose, and to pay to such persons such reasonable sums as the Russian ministry of marine shall see fit to agree upon, and in such cases the contractors shall repay, to the Russian ministry of marine, all such sums as said government shall so pay, or advance, whether the same shall, or shall not exceed what would have been payable to the contractors by the Russian ministry of marine; in that case, nevertheless, paying or allowing to the contractors, on the final completion and delivery of the vessel, the amount of the contract price hereby agreed upon, or so much thereof as shall not have been paid, or advanced by, said government to the contractors, or to the persons, firm, or company employed by the Russian ministry of marine to complete the said works, or any part thereof.

Alterations.

ART. 17. Should the Russian ministry of marine during the construction of the vessel, or the fulfilment of this contract, desire to make any alteration in the construction of the vessel, or in its arrangements, fittings, or equipment, its armaments, engines or machinery, and should such alterations be duly authorized in writing, by the board of inspection, but not otherwise, it shall be carried into execution by the contractors, within such reasonably extended time, if any, as may be approved, in writing, by the board of inspection, and if the time be extended, then this contract shall read as if the extended time had been originally mentioned therein, and if no extended time shall be so approved, then all such works and alterations shall be completed within the time above mentioned, and such alterations, if any, shall be performed, and executed in such manner as the nature of the alterations may require and as if the same had been originally mentioned herein, or in the specifications forming part hereof, and the enhancement, or reduction of cost, arising directly or indirectly therefrom, shall be valued, and if possible shall be agreed upon, by the parties hereto, and the amount of any such enhancement, if so agreed, shall be due and payable with the next instalment to fall due under this contract, or (as the case may be) the amount of any reduction, if so agreed, shall be deducted from the said instalment.

Payments.

ART. 18. The Russian ministry of marine agrees to pay to the contractors for the said vessel, complete in accordance with the specifications, and furnished with the articles specified in the lists annexed to these specifications, (exclusive of armament and torpedo outfit and their installation) the sum of — dollars, and the said amount, shall, provided the contractors shall with due diligence,
27 and to the satisfaction of the board of inspection, duly commence, and having commenced, duly proceed with the execution of this contract, be paid in accordance with the schedule annexed. The instalments shall be paid by the Russian naval attaché to the imperial Russian embassy in the United States, after he has each time received a certificate from the board of inspection stating that the work which renders the contractors entitled to receive the following instalment has been duly executed in accordance with this contract and specifications. Payments shall be made in Philadelphia in prime banker's drafts, in ten several equal instalments as hereinafter set out, except that 10 % of each of said instalments shall be withheld by the ministry of marine until the final payment is made as hereinafter provided.

1. Ten per cent. (10 %) when the material begins to come in the yard.

2. Ten per cent. (10 %) when 300 tons of material have been worked into the hull and 85 tons more are on the premises ready to go into the hull.

3. Ten per cent. (10 %) when 500 tons of material have been worked into the hull and 100 tons more are on the premises ready to be worked into the hull and one-half the cylinders are cast.

4. Ten per cent. (10 %) when 800 tons of material have been worked into the hull and 200 tons more are on the premises, all the cylinders cast and tubes and plates for drums of boilers have been received.

5. Ten per cent. (10 %) when 1,000 tons of material have been worked into the hull, 200 tons more are on the premises ready to go into the hull and half the cylinders bored, one-half the condensers cast and one-half the connecting rods, pistons and valve stems have been received in shop.

6. Ten per cent. (10 %) when 1,400 tons of material have been worked into the hull, 200 tons more are on the premises, cylinders bored, bed-plate machined, condensers cast, and the balance of the connecting and piston rods and valve stems have been received in shop.

7. Ten per cent. (10 %) when half the decks are caulked, one-half the water-tight compartments tested with water pressure and the crank shafts received in shop.

8. Ten per cent. (10 %) when three-fourths of the decks have been laid and caulked, the storerooms and magazines built and lined, one-half the cabin bulkheads in place, and the vessel successfully launched.

9. Ten per cent. (10 %) when steam has been raised in the boilers and the engines turned over under their own steam.

10. Ten per cent. (10 %) when the ship has had a successful trial trip and has been turned over to the imperial Russian government, and simultaneously therewith there shall be paid to the contractors the 10 % of each of the previous installments which shall have been withheld as aforesaid.

28 *Builder's Certificate.*

ART. 19. The contractors undertake the fulfillment of all necessary formalities, with regard to the Government of the United States, which are required by the laws of that country with reference to the building of war vessels by private firms or companies for a foreign government.

Disputes and Arbitration.

ART. 20. If at any time after the date of this contract and until the final delivery of the said ship to the Russian ministry of marine, including herein 12 months of guarantee time, any dispute or difference shall arise between the board of inspection and the contractors, it shall be referred, together with the opinion of the Russian naval attaché, as regards the matter, to his excellency, the Russian minister of marine, whose decision shall be final and without any further appeal.

Notwithstanding, however, the existence of any such dispute or difference, the contractors shall not be entitled, on any ground whatever, to withhold possession from the imperial Russian authorities of the ship, or any of its equipments, or any of the matters or things as aforesaid, whether complete or in progress, as hereinbefore provided.

Copies of Agreement.

ART. 21. The contractors undertake to provide at their expense, — printed copies of this agreement in English, and to deliver them to the Russian naval attaché in Washington.

Stamp Duty.

ART. 22. The contractors covenant and agree, that the stamp duty shall be deducted, in accordance with the laws of the Russian empire, from the first payment due to said contractors under the provisions of this agreement.

In witness whereof, the representative parties hereto, have set their hands and seals, the day and year above written. This contract being executed in English, the above text shall govern.

—— ——.

—— ——.

Signed and sealed in the presence of:

—— ——.

Preliminary Specifications.

General scheme of cruiser of 6,000 tons displacement in accordance with our letters submitted to the technical committee on March 29th and April 12th, and accepting in general the terms of the "Programme for a cruiser of 6,000 tons displacement," sent us by Chief Inspector N. Kouteynikoff under date of 13th April (1st March), 1898.

29 The general design of the hull is as follows:

1. The displacement must not be more than 6,000 tons, with normal supply of coal and other stores.

2. The metacentric height must not exceed 2½ feet when the coal is stowed in the bunkers, both above and below the water-line, and with no water ballast.

3. The hull to be constructed with double bottom and not sheathed.

4. The supply of coal to be not less than 12 per cent. of the normal displacement, and the speed must be twenty-three (23) knots during a continuous trial of twelve hours.

5. The coal-bunker capacity must be so calculated as to allow a radius of action of 5,000 knots at 10 knots speed. The coal consumption on which to base the calculation of the radius of action to be ascertained by 24 hours continuous trial; allowance being made for 8 tons per day of 24 hours for auxiliary engines, steam-heating, electric light and other ship's purposes.

6. The vessel to have twin screws and water-tube boilers of the Niclausse type.

7. The weight of spare parts for the engine (.001 tons) and machinery stores (.003 tons) must equal to .004 tons for I. H. P.

8. Evaporators ought to be in such number and of such capacity that they could, together with the constant supply of reserve fresh water fill up the loss of water in the boilers during the whole radius of action for which the maximum supply of coal will last; and the product of the evaporators must be not less than 5 % of the evaporation of all boilers in full operation. Distillers for drinking water must have a capacity of one ton every 24 hours for every 20 men. The evaporators to have reserve batteries.

9. The cruiser to have a protected deck, over which, extending the whole length of the ship, independent of the coal, must be placed cofferdams for cellulose. Conning tower to be 6 inches thick, and the protection around the base of the smokestacks of the boilers 1½ inches thick.

10. The desirable armament is as follows:

12 6-inch guns, calibre 45.
12 75 m/m guns, calibre 50.
6 47 m/m guns, Hotchkiss one barrel.

In calculating the weight of this armament the following weights of ammunition and supplies must be taken into consideration:

30 The weights are as follows:

12 6-inch guns without shields, but with accessories and mounts	150.35 tons.
6-inch ammunition, 180 rounds, for each of the above with cages	162.36 "
12 75 m/m guns with mounts, shields and accessories	27.94 "
75 m/m ammunition, 300 charges for each gun with cages	43.61 "
6 47 m/m guns, including stands, shields and accessories, with 810 charges each	21.27 "
Small arms, revolvers, and ammunition for same	5.8 "
Ammunition hoists, rails, turn-tables, electric winches	29.00 "
Total	440.34 tons.

For the proper supply of ammunition to the guns there should be—

One ammunition hoist for each 6-inch gun.

One ammunition hoist for every 4 75 m/m guns.

Two ammunition hoists for the 6 47 m/m guns.

The guns and fittings to be provided by the Russian government, but the ship to be ready in time to receive them.

11. Torpedo armament:

	Weight.
Two under-water tubes and fittings in broadside	600 poods.
Four above-water tubes and fittings of which one is on the bow and one on the stern	800 "
Fourteen Whitehead torpedoes	420 "
Thirty-five floating mines with anchors	1,050 "
Three medium-size air-compressors	105 "
Four dynamos, 640 amperes, placed above the water-line	1,600 "
Two dynamos, 320 amperes, placed above the water-line	720 "
Six search-lights	150 "
Torpedo outfit for two torpedo launches	150 "
Nets	1,200 "
Total	6,675 "
Allow for fittings and spares 20 %	1,350 "
Total	8,025 poods.
Equal to	134 tons.

31 All of the above torpedo outfit to be supplied by the Russian government; the ship to be ready in time to receive it.

12. Officers 21, petty officers 9, crew 550.

Provisions for 60 days; water for ten days.

13. Boats as follows: 2 40-ft. steam launches.
2 12-oar cutters.
1 16-oar barge.
1 14-oar working cutter.
2 6-oar whaleboats.
2 6-oar yawls.

Total ..... 10 boats.

14. Anchors, chains, etc.

Anchors of the improved Martin system or Hall, the latter with stocks. Two bower anchors, two spare anchors; two hawse pipes; two bower chains, 150 fathoms each and two spare chains 100 fathoms each.

15. Boatswain's stores, awnings, sails and outfit as usually provided.

16. Drainage system to be of the simplest possible construction; to consist of separate pumps whose pumping-out capacity in one hour's time be not less than the cubic contents of the compartments in which they are fitted; the main circulating pumps for the condensers to be adapted for pumping water out of the hold with an arrangement facilitating the turning of the outside water circulation to the circulation from the hold.

The dimensions of the ship will be—

Length between perpendiculars	400 feet
Beam	52 feet and
Draft, about	19 ft. 6 in.

The distribution of weights is about as follows:

Hull and fittings	2,900
Machinery	1,250
Ordnance	574
Outfit and stores	550
Coal 12 % of displacement	720
	6,000 tons.

32 *General Summary of Work Pertaining to Hull.*

The hull to be built, launched, fitted, and made complete in all respects, with cabins, ward-room, state-rooms, pantries, storerooms, magazines, shell-rooms, bath-rooms, water-closets, complete steering, pumping and ventilating arrangements, steel masts and tops, stepping, securing and coating the same; also wood topmasts, and all forgings, etc., in connection therewith for the proper securing of the rigging, etc., all articles of equipment, anchors and chains, spars, awnings, sails, standing and running rigging, blocks, boats, galleys, portable furniture, mattresses, oilcloths, carpets, curtains, and fixtures to same; electric call bells, speaking tubes, telephones, etc., all necessary appliances for handling, stowing and securing anchors,

chains, hawsers, and boats, including steam windlass, steam winches and capstans; water and oil tanks, fitting and stowing the same; and prepare for the reception of torpedo armament and gun mounts and appliances.

Articles to be Furnished by the Government.

Ordnance and outfits, guns and gun mounts, turret installation and gear and motive power, torpedo armament, Russian stoves, and all other matters that the Russian government usually furnishes.

Engines.

Engines will be twin-screw, rights and lefts, placed in water-tight compartments separated by middle-line bulkhead; they will be of the vertical, inverted-cylinder, direct-acting, four-cylinder, triple-expansion type, and equal to the best engines that the William Cramp & Sons Ship and Engine Building Company has constructed for war vessels, and to be of sufficient power to secure an easy performance of a 23-knot speed in the ship.

In general details, character of the work and materials, to be equal to and in conformity with the best engines that the company has furnished to the United States and other governments.

The boilers will be of the Niclausse type and sufficiently large to supply with ease the engines.

The engines and boilers will be furnished with the usual appliance for spares, spare parts and auxiliary engines.

They will have the usual steam-reversing gear, ash hoists, coal-hoisting winches, turning engines, auxiliary pumps, engine-room ventilating fans, engines for workshop machinery, pumping appliances for various purposes, distilling and evaporating apparatus, (as per programme), manganese bronze propeller blades, and such other auxiliary or supplementary machinery, tools, instruments or apparatus as are usually supplied to vessels of this description by the William Cramp & Sons Ship and Engine Building Company.

33 *Opinions of the Court.*

And afterwards, upon the 12th day of July, A. D. 1900, the opinion of the court being filed, is in the words and figures following, to wit:

United States District Court, Eastern District of Pennsylvania.

UNITED STATES *ex Relatione* LEO ALEXANDROFF
vs.
ROBERT C. MOTHERWELL, Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag."

Habeas corpus.

MCPHERSON, *J.*:

The relator, who is conceded to be a deserter from the Russian naval service, is confined in the jail of this county by virtue of a commitment issued by a United States commissioner under section 5280 of the Revised Statutes. This section provides the legal machinery for the arrest of deserting seamen and for the delivery of such offenders to the consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting. The proceedings before the commissioner were formally regular, and the testimony taken upon the hearing of this writ of *habeas corpus* discloses no dispute of fact.

The single question for decision is whether article IX of the treaty with Russia, concluded in December, 1832, under which the arrest was made, justifies the prisoner's detention.

The facts are these: The prisoner is a conscript member of the Russian navy whose term of service has not expired, his duty being to care for the sick as an assistant physician.

In the fall of last year he was ordered, and thereupon proceeded, to Philadelphia as one of a squad of seamen who were intended to become part of the crew of the "Variag," a cruiser then and now in course of construction at the ship yard of Cramp and Sons in this city. The vessel is being built under a contract with the Russian government and is nearing completion, but she has not yet been accepted by the Russian authorities.

The prisoner has never been on board of her, and there is no proof that her crew has ever been organized. Not long ago
34 the prisoner deserted the service and took up his residence in the city of New York, where he was arrested upon the written request of the Russian vice-consul at Philadelphia.

Article IX of the treaty is as follows:

"The said consuls, vice-consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers and shall in writing demand such deserters, proving by the exhibition of the registers of vessels, the rolls of the crews, or by other official documents that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused."

Upon these facts, I do not think that discussion is needed. It seems to me to be clear that the prisoner does not fall within the treaty. For this decision there are three reasons:

First. The "Variag" is not yet a Russian ship of war. She is an unfinished vessel, intended no doubt to become a Russian cruiser, but she has not yet acquired, and she may never acquire that character.

Second. The prisoner is not yet a member of her crew. So far as disclosed by the evidence the vessel has no such organization in the sense intended by the treaty. The prisoner and certain associates were ordered to Philadelphia to serve as part of the cruiser's complement but they have not yet begun that service, and may never be called upon to perform it.

Third. Even if it be assumed that the prisoner may be treated in this proceeding as a member of a crew because the Russian government intended that he should hereafter take upon him such a status, the kind of proof required by the treaty to prove his status has not been offered. No register, or roll of the crew, or other official document substantiating the vice-consul's averment has been produced; and, therefore, the evidence specifically described and made necessary by the treaty itself, has not been produced.

It follows that no legal justification for the prisoner's detention has been shown, and that he must be released from custody.

It is proper to add that while this conclusion seems to me to be unavoidable I have reached it with some reluctance. The prisoner is a deserter from the naval service of his country, and I do not regard his abandonment of duty with favor. So far as appears, he has violated a high obligation without sufficient justification, and nothing but a clear conviction of the limited scope of the treaty constrains me to stand between him and the punishment that he apparently deserves. The courts of the United States are
35 bound, and will no doubt always be ready to enforce the treaty stipulations of this Government with a friendly nation; but they are equally bound to adhere to the terms of such stipulations, and to go no farther than the contracting powers have themselves seen proper to direct.

Obviously such a situation as is now presented was not foreseen seventy years ago.

The article in question is dealing with completed vessels, manned by organized crews, that may be visiting the ports of the foreign power and to that subject its provisions must be confined.

It is accordingly ordered that the prisoner be discharged from custody.

And thereupon the respondents, by John F. Lewis, Esq., their counsel, present a petition for leave to appeal from the decree of the court in this cause to the next United States circuit court of appeals for the third circuit, with an assignment of errors, and the said petition and assignment being filed are in the words and figures following, to wit:

Petition for Appeal.

United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag," Appellants,
vs.
UNITED STATES OF AMERICA *ex Relatione* LEO ALEXANDROFF, Appellee.

Sur proceedings in the district court of the United States for the eastern district of Pennsylvania upon petition of Leo Alexandroff for a writ of *habeas corpus.*

The above-named Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," conceiving that they are aggrieved by the decision entered on the 12th day of July, A. D. 1900, in the above-entitled case, hereby appeal from the said decision to the United States circuit court of appeals for the third circuit, and it is prayed that this appeal may be allowed and a transcript of the record and proceedings and papers upon which said decision was made, duly authenticated, may be sent to the United States circuit court of appeals for the third circuit.

JOHN F. LEWIS,
Attorney for Appellants.

CAPTAIN V. BEHR,
Commanding Cruiser "Variag."

36 UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

Vladimir Behr being duly sworn according to law deposes and says that he is one of the appellants above named, that the facts stated in said appeal are true and that said appeal is not taken for delay.

VLADIMIR BEHR.

Sworn — and subscribed before me this 12th day of July, A. D. 1900.

CHARLES S. LINCOLN,
Clerk Dist. Ct. U. States.

Assignments of Error.

And now, to wit, July 12, 1900, the appellants file their assignments of error in the above cause and assign for error therein as follows, to wit:

1. The learned judge erred in holding that the "Variag" was not a Russian ship of war.

2. The learned judge erred in holding that the prisoner was not a member of her crew.

3. The learned judge erred in holding that the kind of proof required by the treaty with Russia had not been offered.

4. The learned judge erred in not remanding the prisoner to custody.

5. The learned judge erred in discharging the prisoner from custody.

JOHN F. LEWIS,
Attorney for Appellants.

June 12, 1900.

And the appeal is allowed upon the usual conditions.

And it is ordered that the relator be required to enter recognizance with surety in the sum of two hundred dollars, conditioned for his appearance at the district court upon the determination of the proceedings under said appeal, to await the further order of the court.

Bond on Appeal.

Know all men by these presents, that the Merchants' Trust Company, having its office at Nos. 611 and 613 Chestnut street, in the city of Philadelphia, and State of Pennsylvania, is held and
37 firmly bound unto Leo Alexandroff, relator in certain proceedings on petition for *habeas corpus* in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said Leo Alexandroff, to which payment well and truly to be made the said The Merchants' Trust Company binds itself and its successors, firmly by these presents.

Sealed with its seal and dated at Philadelphia, this twelfth day of July A. D. one thousand nine hundred.

Whereas, Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," respondent under said petition for *habeas corpus* have lately appealed to the United States circuit court of appeals, for the third circuit from the decree of the Honorable John B. McPherson, judge of the district court of the United States, for the eastern district of Pennsylvania, made and pronounced in the aforesaid proceedings had under the petition for *habeas corpus* therein lately depending between the said Leo Alexandroff, relator, appellee, and Robert C. Motherwell, Jr., keeper of the Philadelphia county prison and Captain Vladimir Behr, master of the Russian cruiser "Variag," respondents appellants.

Now, if the said appellants shall prosecute *its* appeal to effect and answer all damages and costs if *it* fail to make *its* plea good, then this stipulation shall be void, otherwise to be and remain in full force and virtue.

MERCHANTS' TRUST COMPANY. [SEAL.]
JOHN F. LEWIS, *Vice-President.*
Attest: ROB'T M. EARLY, *Secretary.*

Taken and subscribed before me this twelfth day of July, A. D. 1900.

CHARLES S. LINCOLN,
Clerk District Court.

Sealed and delivered in the presence of—
CHARLES S. LINCOLN.
WM. W. CRAIG.

38 *Recognizance of Defendant and Surety.*

UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

We, Leo Alexandroff, residing in St. Petersburg, Russia, and The City Trust, Safe Deposit and Surety Company of Philadelphia, No. 927 Chestnut street, in the city of Philadelphia, and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America, in the sum of two hundred dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Leo Alexandroff, relator in certain proceedings on petition for writ of *habeas corpus*, against Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," lately pending in the district court of the United States for the eastern district of Pennsylvania, shall be and appear at the district court of the United States, for the eastern district of Pennsylvania, upon the determination of an appeal taken by the said respondents, to the United States circuit court of appeals for the third circuit, from the decree of the district court in said proceedings, discharging the relator, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the said court of appeals or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

L. ALEXANDROFF. [SEAL.]
THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, [SEAL.]
By JOS. A. SIMS, *2d Vice-President.*
Attest: JAS. F. LYND, *Secretary.* [SEAL.]

Taken, acknowledged and subscribed this 13th day of July, A. D. 1900 in open court.

WM. W. CRAIG,
Clerk District Court.

(Internal rev. stamp, 5 cents.)

And thereupon the relator is discharged from present custody.

39 UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the foregoing is a true and faithful copy of the record and proceedings in the said court, in a certain cause therein lately depending; to wit: "The United States of America, *ex relatione,* Leo Alexandroff, against Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser 'Variag.' Proceedings on petition for writ of *habeas corpus* of May sessions, 1900, as full and entire as the same now remain among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said district court at Philadelphia, this tenth day of August, A. D. 1900, and in the 125th year of the Independence of the United States.

[SEAL.] WM. W. CRAIG,
Deputy Clerk District Court United States, Eastern District of Pennsylvania.

39*a* United States Circuit Court of Appeals, Third Circuit, September Term, 1900.

"THE KEEPER OF THE PHILADELPHIA COUNTY PRISON and Captain Vladimir Behr, Master of the Russian Cruiser 'Variag,' Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

And now, to wit, this first day of October, A. D. 1900, comes James B. Holland, Esquire, United States attorney for the eastern district of Pennsylvania, at the instance of the executive department of the Government of the United States, and filed of record a suggestion as follows:

Inasmuch as it appears by the record in the above-entitled cause, that Leo Alexandroff, the relator, is a subject and citizen of the Empire of Russia and enrolled in the naval service of his country
39*b* as an assistant physician; that he came to the United States, together with fifty-two other men, under the charge of an officer of the Russian imperial marine, detailed for the purpose of manning the cruiser 'Variag,' a vessel under construction for the Russian government by the William Cramp Ship and Engine Building Company of Philadelphia; that prior to the arrival of the said officer and men and in pursuance of correspondence with the Russian ambassador, instructions were issued by the Secretary of the Treasury at Washington to the commissioner of immigration at New York, admitting the said officer and his subordinates for the purpose of partially manning the cruiser, and inasmuch as the said Leo Alexandroff remained in the Russian naval service after his

arrival in the United States until April 20, 1900, when he deserted, lived a week in Philadelphia and then went to New York, where he was apprehended by Captain Vladimir Behr, master of the 'Variag,' brought to Philadelphia and confined in the county prison for safe keeping, and inasmuch as his period of enlistment in the Russian imperial service was for six years from 1896, and in pursuance of said enlistment he left Russia for America, knowing he was to become one of the crew of the newly constructed cruiser and for that purpose alone, and upon his arrival here and until he deserted, lived with the other members of his company, was supported by the Russian government and received wages for his services as a member of her crew, and inasmuch as it further appears by the record in the above-entitled cause that the said cruiser 'Variag' was built under written contract between the Russian government and the Cramp Company, which provided among other things, as reference to the said record will more fully and at large appear, that the said vessel and all materials entering into her or intended for her construction should become and be the exclusive property of the Russian ministry of marine, and inasmuch further, as there exists between the United States of America and His Majesty, the Emperor of Russia, a state of peace and amity, and inasmuch as it does not appear but that the said officer having in charge the relator and the other sailors he brought to this country has conformed
39c in all things to the law of nations and the laws of the United States, and his authority over and custody and control of the said relator should not be interfered with directly or indirectly by the Government of the United States or by any of the courts created in pursuance thereof, it is respectfully suggested to the honorable, the judges of the circuit court of appeals for the third circuit, that Leo Alexandroff, the relator, should be remanded to the custody of the keeper of the county prison at Philadelphia, to await the order of Captain Vladimir Behr, the master of said cruiser 'Variag.'

JAMES B. HOLLAND,
United States Attorney."

40 And afterwards, to wit, on the first day of October, A. D. 1900, this cause being called for argument on the transcript of record from the district court of the United States for the eastern district of Pennsylvania, before Hon. George M. Dallas and Hon. George Gray, circuit judges, and Hon. Edward G. Bradford, district judge, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the twenty-fifth day of February, A. D. 1901, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinions, to wit:

41 In the United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

Before Dallas and Gray, circuit judges, and Bradford, district judge.

DALLAS, *J.:*

Leo Alexandroff came to this country in October, 1899, in company with fifty-three men and an officer, all of whom, as well as himself, were members of the Russian navy. They were sent here to form part of the crew of the cruiser "Variag," which was then in course of construction for the Russian government at the city of Philadelphia. The vessel was nearing completion, but was still on the stocks and had not been accepted, when Alexandroff, who had not been aboard of her, went, without leave, from Philadelphia to the city of New York, where he soon obtained employment and *formerly* declared his intention to become a citizen of the United States. Having thus manifested his purpose to renounce the service in which he was enrolled, he was arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed by a United States commissioner to the prison of Philadelphia county, upon a mittimus which recited that the cause of his commitment was "desertion from the imperial Russian cruiser Variag," and that he had been apprehended upon the "complaint of the captain of the said cruiser Variag, in accordance with the terms of the treaty between the United States and Russia." Thereupon a writ of *habeas corpus* for his production was allowed by and issued out of the district court of the United States for the eastern district of Pennsylvania. It was directed to the keeper of the prison, and to "Captain Vladimir Behr, master of the Russian cruiser Variag," but the only return thereto was made by the former, who produced the prisoner and submitted a copy of the commissioner's precept.

But a single question was argued and decided in the court
42 below, namely, "whether article IX of the treaty with Russia, signed in December, 1832, under which the arrest was made, justified the prisoner's detention." The learned district judge was of opinion that it did not, and we concur in his conclusion. The clause referred to is as follows:

"The said consuls, vice-consuls and commercial agents are authorized to require the assistance of the local authorities for search, arrest, detention and imprisonment of the deserters from ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers and shall in writing demand such deserters, proving by the exhibition of the registers of vessels, the rolls of the crew, or by other official documents that such individuals formed part of the

crew; and this reclamation being thus substantiated, the surrender shall not be refused."

The Federal courts should, of course, unhesitatingly and with scrupulous fidelity, exercise any jurisdiction they possess to effectuate the treaty obligations of the United States. But the scope of such obligations, as of ordinary contractual engagements, is to be determined by the terms of the instrument creating them, and by no reasonable construction of the article in question can it be made to comprise any undertaking with respect to deserters generally. On the contrary, deserters from ships of war and merchant vessels are distinctly specified, and therefore to such deserters only can the mutual stipulations of the contracting governments be related. *Expressio unius est exclusio alterius.* If more had been intended, less would have been said; but it is in reality manifest that such an event as we are now concerned with was not contemplated at all, for it could not then have been anticipated that the circumstances necessary to its occurrence would ever arise. As was said by the learned judge below, "The article in question is dealing with completed vessels, manned by organized crews, that may be visiting the ports of the foreign power, and to that subject its provisions must be confined." The unfinished Variag was not a "ship" in the sense in which that word was used in the treaty. Completed ships were exclusively in mind. This, we think, is evident from the whole tenor of the article, and is made
43 especially apparent by its precision for proof by documents, which ordinarily pertain to perfected and entire vessels only. She certainly had not become a Russian ship, for under the contract for her construction the Russian government might still have rejected her. Moreover, it is hardly supposable that she would in her then condition and situation have had a crew, and the fact is that she had none. A number of men had been assigned for that service, but as they had not entered upon it, there was, as yet, no crew in being, and Alexandroff's abandonment of those who were to form part of the projected crew cannot be said to have been a deserter "from the ship," for the undisputed evidence is that he had not at any time been aboard of her. The conclusion seems to be inevitable that the learned district judge was right in holding that the treaty under which the arrest was made did not justify it; but it is now further contended that as an act of comity, irrespective of the treaty, an order should have been made for the surrender of Alexandroff to the Russian vice-consul or to Captain Behr, and this contention has had our careful consideration.

In proceedings upon *habeas corpus* the authority of the courts of the United States is not so restricted as to compel them, in every instance, either to discharge the prisoner absolutely or to remand him to the custody of the person producing him. These courts, at least, are empowered and require- to "dispose of the party as law and justice require" (R. S., sec. 761); and if, under the law of nations and the facts of this case, any representative of the Russian government was entitled to have Alexandroff delivered to him we do not doubt that he should have been so dis-

posed of, and hence we are brought to inquire whether under any rule of comity, having the force of law and therefore judicially cognizable, such delivery was demandable. In dealing with this question we will assume the correctness of the proposition that, where sufficient ground for his detention
44 is shown, a prisoner is not to be discharged for defects in the original arrest or commitment; but we cannot accede to the theory advanced in argument that the keeper of the county prison in detaining Alexandroff was acting as the agent of Captain Behr. He had no right to deprive him of his personal liberty upon the mere behest of any man, and it would be unjust to ascribe to him the arrogation of any such right. He detained the prisoner by virtue of a warrant issued by a public officer in seeming conformity with law, and that warrant and nothing else was set up in justification. It did, it is true, direct that the prisoner, unless discharged by due course of law, should be kept "subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag," but this direction did not constitute the jailor the agent of either of those persons. It correctly defined the duty which would have devolved upon him if the commitment had been rightfully made under the treaty of 1832, but as it was not, the direction which was given in supposed compliance with that treaty was simply inapposite and of no effect whatever. The situation, then, was in fact and in law this: Alexandroff was neither in the actual custody of Captain Behr nor under his control. He was detained solely and exclusively by the keeper of the prison, and Captain Behr's inclusion in the writ of *habeas corpus* was unnecessary and redundant. He was not required to answer it, and upon the hearing it appeared that no order for the prisoner's discharge could with propriety or efficacy have been directed to him. In fact he was not ordered to do anything whatsoever. His real position therefore was not that of a defendant who is constrained to respond to a demand, but of an intervenor who himself asks the action of the court for the maintainence of a right to which he claims he is entitled. Consequently the precise question is not as to whether the courts of this country should compel an officer of a foreign navy to release a man who had come here under his command, but as to the right of such offi-
45 cer to require their assistance for the recapture of a deserter. From first to last this right has been asserted and insisted upon, and if Alexandroff had been a member of a crew and had deserted from a Russian ship, its existence would be freely granted, for with respect to "such deserters" it was unquestionably established by the treaty which has been discussed. But it is difficult to understand why the provision of that instrument requiring the local authorities, including judges, to surrender deserters should have been confined to deserters from ships of war and merchant vessels if, as is now contended, the law of nations had already imposed upon the courts the duty of surrendering all naval deserters whether from ships of war or not. "Treaties are usually allied with a change of law" (Hall's Int. Law, 4th ed., 12), and it is plain, we think, that the particular article under consideration was intended to create a new

obligation, and not merely to prescribe how a subsisting one should (in certain only of the cases covered by it) be performed. Congress has quite distinctly indicated that its understanding of the matter accords with our own, for in declaring the duties of the courts upon the subject it has expressly restricted the applications upon which their interposition may be required to such as may be made on behalf of "any foreign government having a treaty with the United States" (R. S., sec. 5280), and, in our opinion, this restriction does not conflict with any duty imposed by international law.

That the public vessels of a State are exempt from attachment or arrest under the municipal law of a foreign nation, even when found in waters within its jurisdiction, must be acknowledged (Exchange *v.* McFadden, 7 Cr., 116), and "it is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it by permission of its government or sover-ign, is exempt from the civil and criminal jurisdiction of the place" (Coleman *v.* Tennessee, 97 U. S., 509). But neither of these immunities is now in question. Neither of
46 them has been invaded. Neither of them is impugned. No attempt has been made to subject a Russian vessel to any process of our courts, nor has exemption from their jurisdiction been denied to any member of the Russian army or navy. Alexandroff was arrested in pursuance of a request made by the Russian vice-consul himself, and he was not in the custody of Captain Behr at the time of his discharge. Consequently, neither the vice-consul nor Captain Behr was, at any stage or in any manner, coerced by or under the authority of the United States. The commitment was made upon the assumption that it was called for by the treaty of 1832, and when it appeared to the court inquiring "into the cause of restraint of liberty" (R. S., sec. 752), that this assumption was an erroneous one, it became the plain and imperative duty of that court, in the absence of any other ground for detaining the prisoner, to order his release. We agree that the application for his delivery to Captain Behr legitimately presented a cognizable demand; but upon such an application, the party making it—who seeks the judgment of the court in his favor—becomes the actor. He invites the exercise of its jurisdiction. It is not imposed upon him. Furthermore, the rule of comity which accords to an army of one nation, when within the territory of another by its permission, the privilege which is here asserted is not, in our opinion, pertinent to this case. We do not doubt that it is applicable to a marine force as well as to a land force, but, as to either, it respects organized bodies only. A single regiment or a single crew, for instance, may be entitled to its allowance, but exemption from compliance with the law of the land is not to be conceded to any man or number of men merely because he or they happen to be in the military or naval service of a foreign State. Captain Behr and those who came with him were members of the Russian navy, but as an aggregation they were not an integral component of it. It was intended that they

should become part of an organization which was to
47 be comprised in that navy, but that organization was still unformed. The men were by Russian law subject to the captain's control, but this did not of itself make them when conjointly considered a constituent unit of the Russian navy, for at the time in question no such unification had been effected. If there had been but two or three instead of more than fifty men under his command, it could hardly have been argued, we think, that they and he should for the present purpose be regarded as representative of the Russian navy, and surely the existence or non-existence of such representative character cannot be dependent upon the number of persons who may be alleged to be clothed with it. The true criterion rests upon the obvious distinction between the concrete parts into which a navy is usually divided and its individual members. The former stand for the navy; the latter do not. The individuals who were detailed for the purpose of partially manning the Variag were not marching through this country, nor were they, in the ordinary sense of the word, stationed here. If the Russian government had requested their recognition and admission as a distinctive part of its navy, and that request had been acceded to by the Executive Department of our Government, a different situation would have been presented, with respect to which we need express no opinion, for the fact *fact* is that no permission for their landing was either asked or given, and we have not been persuaded that any one concerned supposed it to be requisite or had any thought of invoking or conceding any immunity which might have accrued from it. The Treasury Department, by its letter of October 4, 1899, did not assume to confer or define any privileges other than those which were mentioned in it. The Russian ambassador, to whom it was probably addressed, was merely informed that the usual examination would be waived, and that no head tax would be demanded, and it is simply impossible to infer from this relinquishment of those particular exactions that it was either
48 intended or understood that the persons referred to were, after landing, to be regarded as or treated like a foreign army. Such effect could not be attributed to that communication without grossly perverting its plain meaning and transforming an act of common courtesy on the part of the Treasury Department with relation to matters within its province into an international compact which it would have no authority whatever to make.

The learned district attorney for the eastern district of Pennsylvania, acting by executive authority, has suggested in writing that Alexandroff should be remanded to the county prison to await the orders of Captain Behr. This suggestion will now be filed in the office of the clerk of this court, but as it is not, in our opinion, well founded in law, it necessarily results that it cannot prevail. It presents no facts which do not appear upon the record before us, and the legal effect of those facts *are* for determination exclusively by the court. The present case is not in this respect at all like that of "The Exchange," which Marshall, C. J., observed: "If this opinion be correct, there seems to be a necessity for admitting that the fact

might be disclosed to the court by the suggestion of the attorney for the United States."

We have reached the conclusion that neither the treaty, which was at first relied on, nor the rule of comity, which has since been pressed upon our attention, is applicable to the facts now presented, and therefore the order which was made by the district court must be and is affirmed.

49 In the United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,
v.
THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

Appeal from the district court of the United States for the district of Pennsylvania.

Before Dallas and Gray, circuit judges, and Bradford, district judge.

GRAY, *J.*:

Although I agree in the conclusion reached by Judge Dallas, I deem it necessary to state, as briefly as possible, the grounds upon which I hold that the relator should be discharged.

The learned judge of the court below was undoubtedly right, as the case was presented to him, in declining to hold Alexandroff and in ordering his discharge. We surrender deserting seamen from foreign vessels, whether of war or of merchant marine, only under the obligation of treaties (Moore on Extradition, vol. 1, p. 612, sec. 408), and it was under the provisions of our treaty with Russia in that regard that it was claimed that Alexandroff was arrested and held subject to the order and requisition of Captain Behr, who was in command of the detail of men belonging to the Russian navy and awaiting the completion of the ship of war "Variag," then on the stocks at Cramp's ship yards, in Philadelphia. That his arrest and detention, under color of process issued in pursuance of the stipulation of said treaty and of the act of Congress passed to carry out the same, was unjustified and illegal has been fully and clearly shown in the principal opinion in this case. It is also clear, as stated in that opinion, that under the provisions of section 761 of the Revised Statutes the court below were not constrained to set the relator at liberty, even though the particular proceedings and commitment pursuant thereto by which he was held were un-
50 warranted and illegal. If, under the obligations of public law or of comity usually exercised between friendly nations, there was a duty on the part of the Government of the United States to aid Captain Behr in the capture of a deserter from his force, or to recognize the right of the commander of that force, in the exercise

of military discipline, to cause his forcible arrest and detention by those under his command, it would have been the judicial duty of the court below to surrender the relator into the custody of the commander of that force, notwithstanding the indefensibility of the particular proceedings under which he was arrested. No claim on this ground appears to have been urged at the hearing of the cause in the court below.

Notwithstanding this, we agree in holding that this contention may be made upon proper grounds before this court, and, if sustained, this court would be authorized to and should reverse the judgment of the court below and order the relator to be delivered to the custody of the commanding officer of the Russian naval force. Accordingly, it has been urged with force and ability in the argument of this appeal that Alexandroff was a member of a detail of the military forces of the Czar of Russia; that, organized as such under command of proper officers, this military detail came to this country to form part of the crew of a Russian man-of-war, then building for the Russian government, at Philadelphia, and proceeded from the port of debarkation to that city, there to await the completion of the ship which they were intended to man. The claim is made that, under the rules of international law, this force was entitled to have extended to it the comity which is due where the army or an organized portion of the military force of one sovereign enters upon or crosses the soil of another with the permission of the latter. It is true that if such permission is given, then there is implied a right or privilege in the commander of such organized military body to enforce discipline, which would include the right to arrest and detain a deserter, and also to be exempt from operation
51 of the civil and criminal laws of the country through which he is passing or in which he is remaining; but while this comity and these privileges and immunities flow from and are implied in such a permission from the sovereign of the soil and do not require to be distinctly enumerated or stated, it is also true that the permission of such sovereign must be express and is not to be implied. This seems the settled doctrine founded on the opinion of Chief Justice Marshall in the celebrated case of "The Exchange" (7 Cranch), which has not only stated but has become the received expression of international law on this subject.

While it is usual to speak of the "armies" of one sovereign crossing or remaining upon the soil of another, with the permission of the latter, as entitled to this comity, there is nothing in the reason of the rule or of the authorities in support of it which would deny this comity to any organized military force, however small, provided it was large enough to be susceptible of military organization and of acting offensively or defensively. In this case, therefore, I am of opinion that the detail of fifty-eight men, if organized as part of the military and naval force of Russia, coming here for the purpose disclosed in the record, might sufficiently possess the character that would, so far as this case is concerned, be entitled to receive and enjoy the comity and privileges flowing from such a permission as we have already described if properly granted by our Government

The record, however, is fatally defective in that it does not disclose the absolutely essential fact that permission was given to such a force or to the representative of its sovereign to enter this country as an organized military body. In a matter so important as the assertion of the sovereignty of another country upon our soil, nothing but the clearest evidence of that executive permission from our Government which international law demands as a prerequi-
52 site to the enjoyment of those privileges which flow from comity will justify the assertion of such a claim. When asked for the evidence of such executive permission we are pointed by the appellants to the record for a copy of the letter of the acting Secretary of the Treasury, dated October 4th, 1899:

"No. 19805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 4, 1899.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard in Philadelphia, Pennsylvania.

The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case.

Respectfully yours, O. L. SPAULDING,
Acting Secretary, T. U. S."

This letter, it will be observed, has no address, and there is nothing in the record to show to whom it was written. We are told by counsel, and it seems to be assumed, that it was written to the Russian ambassador, but even when we assume this it falls far short of conveying to this court the information that is absolutely necessary for the contention of the appellants in this case, to wit, that the requisite permission was granted by the President to the Russian government to land, march across our country, and indefinitely hold therein a military force of the Czar of Russia. Whether they were admitted as a military organization or not, they clearly were not immigrants, and therefore not amenable to the immigration inspection laws nor to the head tax imposed and collected by the customs authorities from immigrants. The same response would have been made as to any civil employees of the Russian government coming here temporarily in the government service. There is no evidence whatever that more was intended on either side. The evidence is quite the other way. It does not appear what the request of the Russian ambassador was to which this letter is said to be a
53 reply. The wording of the Treasury Department's letter does not necessarily imply a request from the Russian government that these men should be permitted to land as a military

force. For an illustration of how information from the Executive is conveyed through the Secretary of State in direct and categorical terms, see letter of Mr. Webster, Secretary of State, to Mr. Crittenden, Attorney General, March 15th, 1841, in the case of Alexander McLeod, 6 Webster's Works, 262, and it is to be observed that where the Executive permission in question is given it is given by the President, through the Secretary of State, who is the sole organ of Executive authority for communication with foreign powers.

But reliance is also placed upon a matter that does not belong to the record and forms no part of the proceedings in the court below. We refer to the suggestion made in this court for the first time by the district attorney of the United States for the eastern district of Pennsylvania. It is claimed that this suggestion, purporting to be made by the direction of the Executive authority of the United States, is binding upon this court. We do not deny that a suggestion so made by the proper law officer, representing in that regard the Executive, might be an appropriate vehicle to convey from the Executive to this court information of the fact, if fact it be, that this detail of men from the Russian navy, under Captain Behr, had received the permission of the Executive of this country to land at New York, cross over to Philadelphia, and there remain as a part of the organized military force of the Czar of Russia. It may be admitted that direct and positive information so given would conclude this court as to the question of fact, which was the subject of such information, and thus change the aspect under which we are now compelled to view the case, but no such information from the Executive was conveyed or attempted to be conveyed by the suggestion filed. The district attorney merely undertakes,
54 in obedience to the stated direction of the Executive, to call the attention of this court to the facts disclosed in the record, and to state argumentatively a construction which he thinks should be placed thereon. The interpretation of the record in this case is the function of the court, and not of the Executive, and the suggestion is in this respect irrelevant. The suggestion of the district attorney, as we have seen, does not disclose the fact of any permission having been given by the Executive to the Russian authorities to land and maintain this detail of men as a military organization of the Russian government. It does not even expressly state that the Executive of the United States, because of the facts recited from the record, recognize- the naval detail under Captain Behr as an organized military force, present on our soil by the requisite permission of the Executive authority of this country.

International law does not sanction the intrusion of the military forces of one sover-ign upon the soil of another by any implied permission of the latter. The presence of such an armed body is so serious and important a matter, involving, as it does, a diminution of the sover-ignty of a country whose soil is thus occupied, that nothing but express permission from the sover-ign of such country can justify it. Without permission, such intrusion is a hostile act, and would have to be defended by the sover-ign of such troops as an act of war or as justified by some supreme necessity,

which comity would require to be accepted as an excuse. It is true that a different rule obtains in the case of the ships of war of one sover-ign visiting the ports and waters of another. There is an implied authority among nations to tolerate this, and extend to such visits an international comity, founded on universal custom and usage among nations. This difference results obviously from the different nature of the intrusion in the one case from that in the other.

Ships of war, from their vagrant character, constantly demand
55 the hospitality of foreign waters. They were made to traverse the waters of the world, and all nations find that their interests and security demand free ingress to and egress from the ports of friendly nations. The character of their operations and activities differ as widely from those of an army as the sea does from the land. Yet, as we have seen, deserters from such ships in a foreign port, though there by the implied permission of its sover-ign, cannot be recaptured, except in pursuance of the stipulations of a treaty, nor can the rule of comity here in question be invoked for such a ship's company or a portion thereof when landed on foreign soil. The permission implied in case of the ship of war does not extend to the crew or ship's company when landed. When they go ashore, even as an organized body, they ordinarily become subject to the local laws.

I am of opinion, therefore, that there is no evidence either in the record of this case or in the suggestion filed by the district attorney that the permission of the Executive, requisite to invoke the exercise of the comity claimed, was ever granted to the Russian government or its representative in respect to this detail of men under Captain Behr.

56 In the United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

BRADFORD, district judge, dissenting:

I dissent from the judgment of the court in this case on the ground that, in my opinion, by the principles of international comity as recognized in this country and declared by the Supreme Court, Captain Behr has a right to exercise discipline over the Russian naval force which came to this country in his charge, including the power to arrest and have custody of Leo Alexandroff, the relator, as a deserter. This ground was not discussed or even considered by the learned judge who decided the case in the court below;

nor am I aware that it was presented to him in argument. He said:

"The single question for decision is whether article IX of the treaty with Russia, concluded in December, 1832, under which the arrest was made, justifies the prisoner's detention."

If the case had involved only the point on which it was decided below, there could be little doubt as to the correctness of the decision, but in this court it has been presented in a new and very different aspect. The record shows that the relator and the other Russian sailors under command of Captain Behr came to this country as members of the Russian navy, under orders to form part of the crew of the cruiser Variag, a war vessel then in course of construction for the Russian government at the ship yard of the William Cramp & Sons' Ship & Engine Building Company, in Philadelphia, under a contract between that company and the
57 Russian ministry of marine. The men composing this detail were subjects of Russia and in the service and pay of Russia, formed part of the military force of that empire, came to this country in a body under military discipline, and in a body entered on our coil, not as private individuals severally bound on business or pleasure, but for the specific and strictly public purpose of manning a cruiser about to be turned over to the Russian government. The broad principles which should be determinative of this case are stated with admirable clearness and force in Schooner Exchange v. M'Fadden, 7 Cr., 116. Chief Justice Marshall, delivering the opinion of the court, said:

"The world being composed of distinct sover-ignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity distates and its wants require, all sover-igns have consented to a relaxation in practice in cases under certain peculiar circumstances of that absolute and complete jurisdiction within their respective territories which sover-ignty confers. * * * A third case in which a sover-ign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sover-ign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable and would be withdrawn from the control of the sover-ign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require. * * * When private individuals of one nation spread themselves through another as business or caprice may direct, ming-

ling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction and the government to degradation if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country."

In Coleman *v.* Tennessee, 97 U. S., 509, 515, the court, referring to the case of the Exchange as authority, said:

"It is well settled that a foreign army permitted to march through a friendly country or to be stationed in it by permission of its government or sover-ign is exempt from the civil and criminal jurisdiction of the place."

The court quoted with approval the following passage from
58 the opinion of Chief Justice Marshall:

"The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."

So in Dow *v.* Jackson, 100 U. S., 158, 165, the same doctrine is recognized. Wheaton, in his Elements of International Law, part 2, chap. 2, § 9, says:

"A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sover-ign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place."

While the terms "troops" and "army" are used in the above citations, I have no reason to doubt that the rule or law of comity as there enunciated is equally applicable to such a military body as the naval detail in question. It is not disputed that comity is operative in the case of an organized regiment of a friendly foreign power while on our soil by permission of the Executive of the United States, and that proper discipline and obedience may be enforced by those in command without reference to our laws, nor is it disputed that comity is applicable to a marine force as well as to a land force. But the position is taken by the learned presiding judge in his opinion in this case that the rule of comity respects organized bodies only; that Captain Behr and the men under him were not an integral component of the Russian navy, not having become part of the crew of the Variag; that the fact that the men were by Russian law subject to the captain's control did not of itself make them, when conjointly considered, a constituent unit of the Russian navy; that the question whether Captain Behr's detail should be considered representative of the Russian navy cannot depend merely upon the number composing it; that the true criterion rests upon the distinction between the concrete parts into which a navy is usually divided and its individual members, the former standing for the navy, while the latter do not, and that Captain Behr and his men were neither marching through this country nor, in
59 the ordinary sense of the word, stationed here. I am unable to assent to the correctness of this line of reasoning or to the conclusion deduced from it. It is, in my judgment, based on too

technical and literal an interpretation of the language of the authorities, and falls far short of satisfying the broad policy underlying that language. The men composing the Russian detail in charge of Captain Behr certainly are not included in the category of "private individuals of one nation" who "spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other." While not completely organized as a crew, they nevertheless possessed organization. As before stated, they were in the naval service of Russia, and came to our soil in a body under military discipline for the sole purpose of manning a Russian war vessel. They were a portion of the military force of a foreign independent nation at peace with and friendly to the United States. It is wholly unimportant, in my judgment, that they had not actually gone abroad of the Variag as a fully organized crew or whether they were or were not fully armed and equipped. Nor is it of any moment that they may not technically have been "stationed" on our soil or were not technically "marching" over it. International comity is not to be frittered away by such refinements. They were here in the employ of their sovereign for strictly national objects and duties. Their organization and the character of their employment clearly brought them within the principles and rules of comity as observed among modern civilized nations, if they were on our soil by the permission or consent of the executive. Captain Behr and his men arrived in this country October 14, 1899. Ten days before such arrival the acting Secretary of the Treasury wrote a letter, of which the following is a copy:

60 "No. 19805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 4, 1899.

SIR: Acknowledging the receipt of your letter of the 24th ultimo, No. 57, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York to admit, without examination, the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard in Philadelphia, Pennsylvania. The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case.

Respectfully yours, O. L. SPAULDING,
Acting Secretary T. U. S."

It is evident on the face of the letter that it was intended for and presumably directed to some representative of the Russian government. That he was the Russian ambassador can hardly be questioned. It appears from the record that the counsel for the respondents below offered the above copy in evidence, stating that the original was from the acting Secretary of the Treasury, permitting the landing of the detail, and was, as he understood, in the possession of the Russian ambassador at Washington. The offer was

objected to by the relator's counsel, but the copy was admitted; whereupon the objection was withdrawn. During the argument of the appeal it was stated positively by the counsel for the appellants that the original was addressed to the Russian ambassador at Washington. This statement in open court, while not expressly acquiesced in by the counsel for the appellee, was not denied, and the argument proceeded, and the case was heard on the assumption that the Russian ambassador was the recipient of the letter. Under the circumstances this court, in my opinion, must treat the above copy as the copy of a letter addressed to and received by the Russian ambassador. Here, then, is a written communication made by the Secretary of the Treasury, one of the branches of the executive department of the Government, directly to the immediate representative of Russian sover-ignty on our soil.

This letter on its face shows several important facts,
61 namely, (1) that it was written in reply to a letter of the Russian ambassador of September 24, 1899; (2) that the instructions issued to the commissioner of immigration to admit the detail without examination, and to the collector of customs not to collect head tax, were "in compliance with request contained therein"— that is to say, a request contained in the letter of the Russian ambassador; (3) that the Russian ambassador had stated that the detail of one officer and fifty-three regular sailors had been "detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard, in Philadelphia, Pennsylvania," and (4) that, whatever may have been the reason for not insisting upon examination or collection of head tax, the detail was to be admitted into the United States "in compliance with request" of the Russian ambassador. Assuming for the present that the action of the Secretary of the Treasury in thus dealing with the Russian ambassador must be taken as the act of the Executive, the Russian government had just cause to expect that its naval detail would be accorded the privileges and immunities incident to the observance of the comity due between independent but friendly nations, without which it might well be questioned whether that government would have allowed the entry of the detail upon our soil at all. There was a request by Russia through her ambassador, and permission and consent on the part of the executive department of the United States, that the detail should be admitted to our territory for the specific purpose of manning a Russian war vessel. I wholly fail to perceive any force in the suggestion that while the letter of the Secretary of the Treasury contemplated a dispensation of the usual examination and of the collection of head tax, it did not contain a permission that the detail should be admitted into the United States. Instructions to admit — or without examination or collection of head tax are still instructions to admit. The

contention that consent was not given for the admission of the
62 naval detail *qua* military force is, in my opinion, usually untenable. The permission contained in the letter was not to admit "private indi-cuals of one nation" to "spread themselves through another as business or caprice may direct," but to admit

"the detail of one officer and fifty-three regular sailors" who had been "detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard, in Philadelphia, Pennsylvania." Here is an express consent to the admission upon our soil of a military force *qua* military force, and in no other character or capacity. It was a naval detail under the command of a naval officer, and the sole purpose of its admission appears on the face of the letter to have been purely military, namely, the manning of a Russian war vessel. The contention under discussion seems to involve the assumption that as a prerequisite to the operation of comity the permission granted to a military force of a friendly foreign power to enter or remain upon our soil *qua* military force must be coupled with an enumeration of the privileges and immunities to be accorded to such force while here; but such an assumption is unfounded. While such a specification or enumeration may properly be the subject of convention between sover-ign powers, it is well settled that in the absence of such convention the admission upon our soil of a military force *qua* military force carries with it by implication the same right on the part of the commander to enforce discipline and compel obedience as exists in the country to which it belongs, in so far as its exercise is not prejudicial to us; and this right continues until terminated by an act of sover-ignty on the part of the United States. In the case of The Exchange, *supra*, Chief Justice Marshall, speaking of the passage through a sover-ign's dominions of the troops of a foreign prince by the allowance or permission of the former, said:

"In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sover-ign who should attempt to exercise it would cer-
63 tainly be considered as violating his faith. * * * The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."

The consent given by the executive department to the entry of the Russian detail for the purpose of manning the Variag by necessary implication involved consent that the detail should in that character remain on our soil and have a "right of passage" over our soil for that purpose. Good faith between friendly nations, as well as the obvious sense of the communication repudiates any other interpretation. The idea that the consent given was restricted to the mere admission of the detail upon our soil, and that it was intended that immediately thereafter that body should lose its cohesive power and discipline as part of the military force of Russia, is inadmissible. If the consent given by the Treasury Department is to be taken as the act of the Executive, international comity requires the recognition of a right on the part of Captain Behr, as commander of the detail, to exercise military discipline, which, of course, includes the usual and indispensable power possessed by commanders of military forces to arrest and have custody of a deserter.

The Executive speaks and acts through the heads of the several departments in relation to subjects pertaining to their respective duties, and their action with respect to such subjects is presumed to have been taken with the approval and by direction of the Executive. Wilcox *v.* Jackson, 13 Pet., 498, 513; United States *v.* Eliason, 16 Pet., 291, 302; the Confiscation cases, 20 Wall., 92, 109; United States *v.* Farden, 99 U. S., 10, 19; Wolsey *v.* Chapman, 101 U. S., 755, 769; Runkle *v.* United States, 122 U. S., 543, 557. The State Department is the executive branch of the Government which is charged with our foreign relations, and the Secretary of State, as the head of that department, is the usual channel of communication with foreign powers; but I am not aware that either he or that department is the only channel through which such com-
64 munication can be made. Certainly the Executive has power to communicate with a foreign ambassador through the Treasury Department touching matters in which the foreign sover-ign is interested, which are within the scope of the functions of that department; and if the Secretary of the Treasury deal with a foreign ambassador touching such matters, it must be presumed, in the absence of evidence to the contrary, that such dealing is had by direction and with the approval of the Executive. Especially is this true where without such authorization, general or specific, the action of that department would involve a breach of law. It is unreasonable that the exercise of comity should be made to depend in a case like this upon such formalities as would naturally and properly attend the granting of permission by the Government of the United States to a fully organized and equipped foreign army to traverse our territory. The law regards substance rather than form. The comity which should be observed between the United States and Russia as friendly nations at peace with each other should not be brushed aside on account of the absence of formalities, which in this case would have been unessential and uncalled for, if not out of place. Russia contracted with an American company for the building on American soil of a war vessel for the Russian government, and sent Captain Behr and his men to form part of her crew. At the request of the Russian ambassador the detail was admitted without examination or payment of head tax. Both of these matters were properly within the cognizance of the Treasury Department, and the action of the Secretary of the Treasury in so admitting the detail should be taken as the act of the Executive; but if it be assumed that the Secretary of the Treasury was without authority to admit the Russian detail to our soil as a military force, and, further, that the letter of October 4, 1899, was not addressed to or received by the Russian ambassador, how would the case stand?

I cannot perceive any difference in principle, so far as the
65 obligation to observe comity toward a friendly nation is concerned, between a case where a portion of its military force has entered the United States with the permission of the Executive and a case where a portion of the military force of such foreign nation, having entered the United States without the permission of the Executive, subsequently remains on our soil with such permission.

In either case the same line of reasoning is applicable. Chief Justice Marshall in the Exchange, *supra*, said:

"We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed. It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sover-ign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character or of exposing itself to the strategems and frauds of a power whose integrity might be doubted and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force, and an army marching into the dominions of another sover-ign may justly be considered as committing an act of hostility, and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may, however, well be questioned whether any other than the sover-ign power of the State be capable of deciding that such military commander is without a license."

It may seriously be doubted whether a detail of the Russian navy, consisting of an officer and fifty-three subordinates, peaceably entering this country for the purpose of manning a Russian war vessel constructed on our soil by an American company under a contract with the Russian government, can justly be considered on the same footing as "an army marching into the dominions of another sover-ign" in the sense in which those words were employed in the above-quoted clause. If, however, it be conceded that such detail should be so considered there is no evidence whatsoever that the executive or any other branch of government of the United States has decided that such detail entered this country or has remained here without proper license or permission. Wholly aside
66 from the correspondence with the Russian ambassador, the record shows the military character of the detail and the purpose for which it came to and remained on our soil, and the United States has not in any manner questioned the authority and right of that detail to continue here in that character for the accomplishment of the purpose for which it came. On the contrary, the Government has clearly recognized such right and authority. By leave of this court the United States attorney for the eastern district of Pennsylvania at the hearing filed the following suggestion:

"United States Circuit Court of Appeals, Third Circuit, September Term, 1900.

THE KEEPER OF THE PHILADELPHIA COUNTY PRISON and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser Variag, Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

And now, to wit, this first day of October, A. D. 1900, comes James B. Holland, Esquire, United States attorney for the eastern district of Pennsylvania, at the instance of the executive department of the Government of the United States, and filed of record a suggestion, as follows:

Inasmuch as it appears by the record in the above-entitled cause that Leo Alexandroff, the relator, is a subject and citizen of the Empire of Russia and enrolled in the naval service of his country as an assistant physician; that he came to the United States, together with fifty-two other men, under the charge of an officer of the Russian imperial marine, detailed for the purpose of manning the cruiser Variag, a vessel under construction for the Russian government by the William Cramp Ship and Engine Building Company of Philadelphia; that prior to the arrival of the said officer and men and in pursuance of correspondence with the Russian ambassador instructions were issued by the Secretary of the Treasury, at Washington, to the commissioner of immigration at New York, admitting the said officer and his subordinates for the purpose of partially manning the cruiser, and inasmuch as the said Leo Alexandroff remained in the Russian naval service after his arrival in the United States until April 20th, 1900, when he deserted, lived a week in Philadelphia, and then went to New York, where he was apprehended by Captain Vladimir Behr, master of the Variag, brought to Philadelphia and confined in the county prison for safe keeping, and inasmuch as his period of enlistment in the Russian imperial service was for six years from 1896, and in pursuance of said enlistment he left Russia for America, knowing he was to become one of the crew of the newly constructed cruiser, and for that purpose alone, and upon his arrival here and until he deserted lived with the other members of his company, was supported by the Russian government, and received wages for his services as a member of her crew, and inasmuch as it further appears by the record in the above-entitled cause that the said cruiser Variag was built under written contract between the Russian government and the Cramp Company, which provided, among other things, as — reference to the said record will more fully and at large appear, that the said vessel and all materials entering into her or intended for her construction should
67 become and be the exclusive property of the Russian ministry of marine, and inasmuch, further, as there exists between the United States of America and His Majesty the Emperor of Russia a state of peace and amity, and inasmuch as it does not appear but

that the said officer having in charge the relator and the other sailors he brought to this country has conformed in all things to the law of nations and the laws of the United States, and his authority over and custody and control of the said relator should not be interfered with directly or indirectly by the Government of the United States or by any of the courts created in pursuance thereof, it is respectfully suggested to the honorable the judges of the circuit court of appeals for the third circuit that Leo Alexandroff, the relator, should be remanded to the custody of the keeper of the county prison, at Philadelphia, to await the order of Captain Vladimir Behr, the master of said cruiser Variag.

JAMES B. HOLLAND,
United States Attorney."

This suggestion made by executive authority, while informal in some respects, not only is a direct recognition and ratification by the Executive of the action of the Secretary of the Treasury in admitting Captain Behr and his command to our soil, but discloses in an unmistakable manner that the attitude of the Government toward that detail is and has been one of international comity. It is not susceptible of any other construction. Further than this, it is a request by the Executive, addressed to this court, that the relator, who is now within its control, be remanded to the custody of the keeper of the prison to await the orders of Captain Behr on the ground that, in view of the existence of a state of peace and amity between the United States and Russia, Captain Behr's "authority over and control of the said relator should not be interfered with directly or indirectly by the Government of the United States or by any of the courts." I do not deem it of any moment that the suggestion refers to facts as appearing by the record instead of independently averring such facts. This at most could constitute only a formal defect. If the record discloses facts sufficient to warrant the observance by the Executive of comity toward Russia with respect to Captain Behr and his command it is all that was necessary. Facts appearing by the record are quite as potent as facts independently asserted in a suggestion if reference be made to the record as disclosing them. That the facts referred
68 to in the suggestion and which appear by the record are sufficient I have no reason to doubt. The attitude of the executive department toward the Russian detail must be regarded as the result of an executive decision, political in its character, which should be respected by all courts. To hold that Captain Behr has no right to the custody of the relator as a deserter from the military force under his command is, in my judgment, not only to ignore the obligations of international comity, but to thwart the executive will as declared to this court in a matter properly of executive determination. Captain Behr, having, as matter of military discipline, the right summarily to arrest and confine the relator as a deserter, misconceived his remedy, erroneously supposing that the facts brought the case within the provisions of article IX of the treaty of December, 1832, between the United States and Russia;

but, although the commitment of the relator to prison in the proceedings taken was not justified by the facts, the court below was not, nor is this court, obliged to discharge him. By virtue of section 761 of the Revised Statutes the court has authority to dispose of him "as law and justice require."

In Nishimura Ekiu *v.* United States, 142 U. S., 651, 662, Mr. Justice Gray, in delivering the opinion of the court, said:

"A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and, if sufficient ground for his detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment."

The intent of sec. 761 is that the party seeking a discharge through *habeas corpus* proceedings should be disposed of as law and justice at the time of such disposition shall require. Iasigi *v.* Van de Carr, 166 U. S., 391. I cannot assent to the proposition advanced in the opinion of the learned presiding judge that the question here presented relates to the right of an officer of a foreign navy to require the assistance of the courts
69 of this country for the recapture of a deserter. Captain Behr is not the actor in this case. On the contrary, the relator has proceeded against Captain Behr and the keeper of the county prison. The former was committed by a United States commissioner to the custody of the keeper of the prison, to be held subject to the order of the Russian vice-consul at Philadelphia or of Captain Behr, master of the Variag. The relator in his petition for a writ of *habeas corpus* prayed that the writ might be directed to the keeper of the prison and to Captain Behr, and the writ was so directed. Although the commitment was illegal, the relator was in fact held by the keeper of the prison subject to the order of Captain Behr, and it was in the power of the latter at any time before the filing of the petition for the writ of *habeas corpus* to take bodily possession of the relator. While the keeper of the prison may not legally have been the agent of Captain Behr, yet his possession of the relator was potentially a possession by Captain Behr, and the writ of *habeas corpus* had for its object the termination of the actual control possessed by Captain Behr over the relator. Having reached the conclusion that Captain Behr, by the law of comity, has from the time of the relator's desertion been and now is justly entitled to the possession of the relator's person, I am of the opinion that the judgment of the court below should be reversed, with directions to remand the relator to the custody of the keeper of the prison, to be by him delivered to Captain Behr or, on his order, to the Russian vice-consul at Philadelphia.

February 23, 1901.

EDWARD G. BRADFORD.

70 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag," Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Relatione* LEO ALEXANDROFF, Appellee.
} No. 22.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the district court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order of the said district court in this cause be, and the same is hereby, affirmed.

GEO. M. DALLAS, *Cir. Judge.*

Philadelphia, February 26, 1901.

71 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag," Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Relatione* LEO ALEXANDROFF, Appellee.
} No. 22.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

And now, to wit, this 28th day of March, A. D. 1901, it is ordered that mandate issue to the said district court of the United States for the eastern district of Pennsylvania in accordance with the opinion and decree of this court in said cause.

GEO. M. DALLAS, *Cir. Judge.*

72 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable judges of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Whereas lately, in the district court of the United States for the eastern district of Pennsylvania, before you or some of you, in a cause between Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian

cruiser "Variag," appellants, and The United States of America *ex relatione* Leo Alexandroff, appellee, wherein the opinion of the said district court entered in said cause on the 12th day of July, A. D. 1900, contained the following order, viz:

"It is accordingly ordered that the prisoner be discharged from custody;"

73 as by the inspection of the transcript of the record of the said district court, which was brought into the United States circuit court of appeals for the third circuit by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears;

74 And whereas in the present term of September, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order of the said district court in this cause be, and the same is hereby, affirmed.

Philadelphia, February 26, 1901.

75 You, therefore, are hereby commanded that such proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 29th day of March, in the year of our Lord one thousand nine hundred and one.

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 22, Sept. term, 1900. Keeper of Philada. County Prison and Captain Vladimir Behr, appellants, *vs.* United States *ex rel.* Leo Alexandroff. Mandate.

76 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages, from one to seventy-five, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case wherein Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," are appellants and The United *United* States of America *ex relatione* Leo Alexandroff is appellee, on file and now remaining among the records of the said court in my office.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this second day of April, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-fifth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," are appellants and The United States *ex rel.* Leo Alexandroff is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
78 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

79 [Endorsed:] File No., 18,127. Supreme Court of the United States. No. 642, October term, 1900. Wm. R. Tucker, vice-consul, &c., *vs.* The United States *ex rel.* Leo Alexandroff. Writ of certiorari.

80 S. C. of U. S., October Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.
} No. 642.

Appeal from the United States circuit court of appeals for the third circuit.

It is hereby stipulated and agreed by counsel of record that the certified transcript on file in the Supreme Court of the United States may be taken and used as a return to the writ of certiorari.

PAUL FULLER,
JOHN F. LEWIS,
Attorneys for Appellants.
ISAAC HASSLER,
BERNARD HARRIS,
Attorneys for Appellee.

May 3rd, 1901.

81 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto as my return to the said writ.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia. this third day of May, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-fifth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

82 [Endorsed:] File No., 18,127. Supreme Court U. S., October term, 1901. Term No., 303. William R. Tucker, vice-consul, &c., *vs.* The U. S. *ex rel.* Leo Alexandroff. Writ of certiorari and return thereto. Office Supreme Court U. S. Filed May 4, 1901. James H. McKenney, clerk.



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SUPREME COURT OF THE UNITED STATES.

ROBERT C. MOTHERWELL, JR., Keeper of the PHILADELPHIA COUNTY PRISON, and Captain VLADIMIR BEHR, Master of the Russian Cruiser VARIAG,

Appellants,

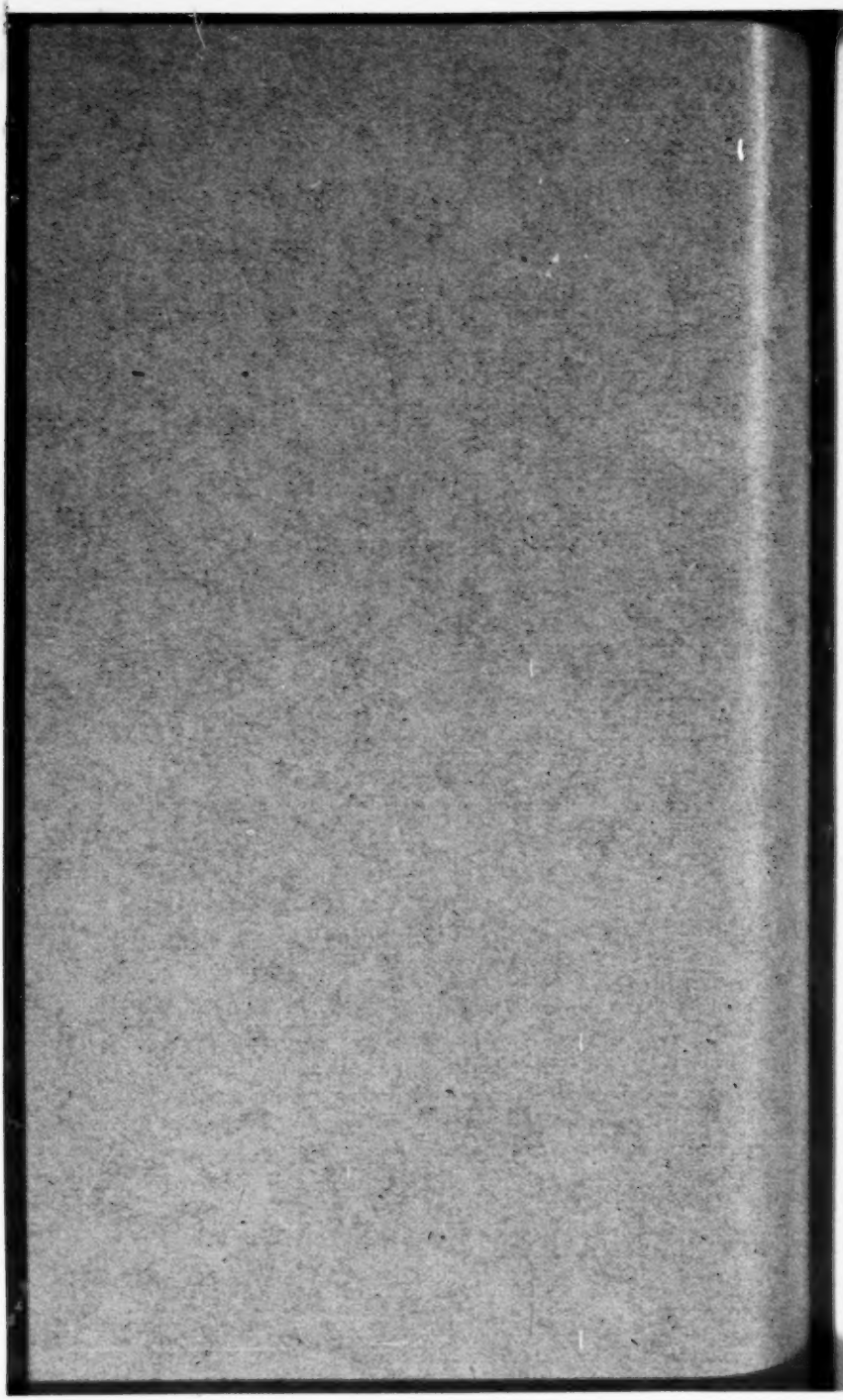
against

THE UNITED STATES OF AMERICA, ex rel., LEO ALEXANDROFF,

Appellee.

Petition for Writ of Certiorari.

LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.



SUPREME COURT OF THE UNITED STATES

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser *Variag*,

Appellants,

AGAINST

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF,

Appellee.

To the Supreme Court of the United States:

The petition of William R. Tucker respectfully shows to this Honorable Court:

I.—That he is the Vice-Consul of Russia at Philadelphia, Pa.; that Vladimir Behr is the Captain of the Russian Cruiser *Variag;* that Leo Alexandroff is a member of the crew of said vessel, and that Robert C. Motherwell, Jr., is the Keeper of the Philadelphia County Prison.

II.—That on or about the 11th day of April, 1898, The William Cramp & Sons Ship and Engine Building Company of Philadelphia entered into a contract with the Russian Minister of Marine, wherein and whereby in consideration of certain payments to it to be made, it agreed to supply to the Imperial Russian Government a Protected Cruiser, built, equipped, armed and fitted in accordance with certain preliminary specifications

and drawings, and in all respect equal to the best ships of corresponding type in the United States Navy.

III.—That in and by said contract it was provided:

"Art. 10, The Contractors agree, that the vessel to be built, as aforesaid, *whether finished or unfinished,* and all steel, iron, timber and other materials as may be required by the Contractors, and be intended for the construction of the said ship, and which may be brought upon the premises of the Contractors, shall immediately thereupon become, and be, the exclusive property of the Russian Ministry of Marine. The flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the Board of Inspection, *as evidence that the same is said Government's exclusive property,* and the Russian Ministry of Marine *may* at any time appoint an Officer or Officers *to take actual possession* of the said ship or material, whether finished or unfinished, subject to the lien of the Contractors for any portion of the value that may be unpaid."

That the parties to the contract also provided:

"Art. 12. The Contractors shall insure, and keep insured, against all risks usually insured against, the said vessel, its engines, and all fittings and materials at their own cost, *but in the name of, and for the benefit of, the Russian Ministry of Marine,* in fire insurance Companies previously approved by the Board of Inspection, and in such an amount or amounts as shall be, from time to time, sufficient to cover up and recoup to the Imperial Russian Government the sum or sums which said Government, for the time being, may have paid, or become bound to pay, to the Contractors in respect of such vessel."

That the parties further provided in and by their said

contract that notwithstanding the existence of any dispute between them

> "the Contractors shall not be entitled on any
> "ground whatever to withhold possession from the
> "Imperial Russian Authorities of the ships, or any
> "of its equipments, or any of the matters or things
> "as aforesaid, whether complete or in progress, as
> "hereinbefore provided."

IV.—That the construction of the said cruiser was commenced subsequently to the execution of the said contract and the cruiser was launched in or about October, 1899.

V.—That the said cruiser was known as the "*Variag*"; that a crew was duly detailed to man the same, from the Naval Battalions and Squadrons composing the Imperial Russian Navy, and that said crew was sent to the United States in various detachments and allowed to land by the Executive, acting through one of his Cabinet, viz., the Secretary of the Treasury, whose duty your petitioner is informed and believes extends peculiarly to such matters.

VI.—That authority to land the detachment containing the relator herein was duly given to the Russian Government by the Secretary of the Treasury of the United States, by reason of a letter of which the following is a copy:

"(36½)

"No. 19,805. TREASURY DEPARTMENT,
Office of the Secretary,
"WASHINGTON, D. C., October 4, 1899.

"SIR:

"Acknowledging the receipt of your letter of "24th ultimo, No. 557, I have the honor to inform "you that, in compliance with request contained "therein, instructions have been issued to the Com- "missioner of Immigration at the port of New

"York, to admit without examination *the detail*
"*of one officer and fifty-three regular sailors whom*
"*you state have been detailed to this country for*
"*the purpose of partially manning the cruiser now*
"*under construction for the Russian Government*
"*at Cramp's shipyard in Philadelphia, Pennsyl-*
"*vania.* The Collector of Customs has also been
"advised that the usual head tax of $1.00 is not to
"be collected in this case.

"Respectfully yours,

"O. L. SPAULDING,

"Acting Secretary,

"T. U. S."

VII.—That on or about the 14th day of October, 189[illegible], the relator, Leo Alexandroff, arrived at Philadelphia, and some time during the same month the *Variag* was launched.

VIII.—That pending the completion of the vessel, the relator lived with the crew that had been detailed as hereinabove stated.

IX.—That on or about the 20th day of April, 1900, the relator deserted from the crew of the *Variag*.

X.—That in and by Article VIII of the Treaty of Commerce and Navigation, concluded in 1832, between the United States of America and His Majesty, the Emperor of all the Russias, it is provided:

"The Consuls, Vice Consuls, and Commercial
"Agents shall have the right, as such, to sit as
"judges and arbitrators in such differences as may
"arise between the captains and crews of the ves-
"sels belonging to the nation whose interests are
"committed to their charge, without the interfer-
"ence of the local authorities, unless the conduct
"of the crews or of the captain should disturb the
"order of the tranquility of the country, or the

"said Consuls, Vice-Consuls, or Commercial "Agents should require their assistance to cause "their decisions to be carried into effect or sup- "ported. It is, however, understood that this "species of judgment or arbitration shall not de- "prive the contending parties of the right they "have to resort, on their return, to the judicial au- "thority of their country."

And in Art. IX thereof that:

"The said Consuls, Vice Consuls, and Commer- "cial Agents are authorized to require the assist- "ance of the local authorities, for the search, ar- "rest, detention and imprisonment of the deserters "from the ships of war and merchant vessels of "their country. For this purpose they shall apply "to the competent tribunals, judges and officers, "and shall in writing demand said deserters, prov- "ing, by the exhibition of the registers of the ves- "sels, the rolls of the crews, or by any other official "documents, that such individuals formed part of "the crews; and this reclamation being thus sub- "stantiated, the surrender shall not be refused.

"Such deserters, when arrested, shall be placed "at the disposal of the said Consuls, Vice-Consuls "or Commercial Agents, and may be confined in "the public prisons, at the request and cost of those "who shall claim them, in order to be detained "until the time when they shall be restored to the "vessels to which they belong, or sent back to their "own country by a vessel of the same nation or any "other vessel whatsoever. But if not sent back "within four months from the day of their arrest, "they shall be set at liberty, and shall not be again "arrested for the same cause."

XI.—That your petitioner not wishing through his subordinates to seize the deserter in any manner that might possibly disturb the peace, obtained from the cap-

tain of the cruiser, an affidavit setting forth the fact of desertion and presented the same to a United States Commissioner, whose assistance he requested for the arrest of the deserter; that a warrant was duly issued for the apprehension of the relator herein and that after his arrest the relator was duly committed by the Commissioner to the Keeper of the Philadelphia County Prison, subject to the order of your petitioner and the captain of the Cruiser *Variag*.

XII.—That on or about the 15th day of June, 1900. Leo Alexandroff, the relator herein, presented to the District Court of the United States for the Eastern District of Pennsylvania, a petition for a writ of *habeas corpus* and a writ was issued on or about the 18th day of June, 1900.

XIII.—That on the return of the writ testimony was adduced and the relator discharged.

XIV.—That the Honorable District Judge placed his decision on three grounds:

First.—That the *Variag* was not a Russian ship of war;

Second.—That the relator was not at the time of his decision, a member of her crew;

Third.—That if he was a member of her crew, the kind of proof required by the Treaty to prove his status was not offered.

XVI.—That as to such grounds, it is submitted:

First.—That the Treaty extends to all vessels and not merely to ships of war, and that the record most clearly and unequivocally shows that the *Variag* was the exclusive property of the Russian Government and possession thereof could not be withheld from it on any pretense whatever.

SECOND.—That the relator conceded that he came to this country as a member of the Russian Navy and had been assigned as an Assistant Physician to the Cruiser *Variag* and he testified under oath that while here he "lived together with the crew" and was under the control "of the superior officers of the crew."

THIRD.—That the Treaty provides for the *exhibition* of the registers of the vessels, the rolls of the crew or *other official* documents, to the officer where assistance in the arrest is required to prove that a deserter is a member of the crew; that on the hearing, Counsel for the Russian Government proceeded to introduce in evidence certain official documents including a passport, to show that the proceedings before the Commissioner were strictly in accorance with the Treaty and the Revised Statutes; that the Counsel for the relator admitted that the proceedings were in accordance with the Treaty and the Revised Statutes and that the relator came to this country as a member of the Russian Navy to become one of the crew of the Cruiser *Variag*.

XV.—That on appeal the determination of the District Judge was affirmed by the Circuit Court of Appeals held in and for the Third Circuit, but by a divided court.

XVI.—That the Circuit Court of Appeals approved both the conclusion reached by the learned District Judge in so far as a determination of the case depended on the treaty and the reasons assigned by him for the same.

That all three of the learned Judges of the Circuit Court of Appeals agreed moreover that good faith and international comity require the apprehension and surrender of a deserter from an organized body of either a foreign land or marine force allowed to land in this country by permission of the Executive; that one believed that the rule of comity did apply to this

case while the other two concluded that it did not, each however assigning an entirely different reason for his determination and each disagreeing from the other as to such reason.

That Mr. Justice Dallas decided that the rule did not apply because the relator did not belong to an organized body, and that while a crew was an organized body the relator was not a member of a crew notwithstanding his testimony that while in Philadelphia he lived with the crew and was subject to the orders of his superior officers; that neither of the associates of Mr. Justice Dallas concurred in his reasoning.

That Mr. Justice Gray decided that the rule did not apply because the record was deficient of any evidence showing any express permission by the Executive to the Russian Government to land Captain Behr and his men as a military body, notwithstanding that the record did contain the letter of the Secretary of the Treasury permitting the landing of an officer and fifty-three regular sailors for the purpose of manning a war vessel the property of the Russian Government, that neither of the associates of Mr. Justice Gray concurred in his reasoning.

That there was no real agreement between any two of the learned Judges of the Circuit Court of Appeals and that therefore the conclusion of the two who chanced to agree in the result though dissenting from each other as to reasons for the same should be reviewed by this Court.

XVII.—That the Treaty above mentioned provides in Article VIII thereof that the Consuls, Vice-Consuls and Commercial Agents shall have the right as such to sit as judges *without the interference of the local authorities* in such differences as may arise between the captains and crew of the vessel belonging to the nation whose interests are committed to their charge, but that the judgment of such consular court shall not

deprive the contending parties of the right they may have to resort *on their return to the judicial authority of their country.*

That the meaning and intent of this provision was to clothe the Consuls or Vice-Consuls of the United States in Russia and of Russia in the United States with jurisdiction exclusive of the local tribunals of all matters of difference between captains and their crew, and that the right to review the determination of such consul or vice consul is conferred on and confined to the courts of the country to which the parties belong.

That the Treaty further provides in Article IX thereof that application may be made to the local authorities to *assist* in the apprehension of deserters and that such assistance shall not be refused where the request is in writing and an official document is presented showing that the accused was a member of the crew from which he is charged with deserting; that your petitioner duly applied for such *assistance* to a United States Commissioner, pursuant to the provisions of the Revised Statutes and that the relator herein admits that the proceedings were in accordance with the Treaty and the Revised Statutes.

XVIII.—That inasmuch as there was a *vessel* here, the property of the Russian Government, and as the relator was a member of the crew assigned to that vessel the District Court of the United States was without jurisdiction to interfere with the action of your petitioner in the proceedings taken for the arrest of such deserter, in which he was entitled to the assistance alone of the local authorities.

XIX.—That in and by the said Treaty it is also provided that the Consuls, Vice-Consuls, Agents and Commissioners shall enjoy the same privileges and powers as those of the most favored nations.

That a reference to the powers and authority of Con-

suls under and by virtue of other treaties most clearly shows that the jurisdiction of the consular courts is exclusive of the courts of the country to which they are assigned.

The Treaty of 1880 with Belgium in Articles XI and XII thereof provides that the consular courts shall alone take cognizance of differences arising at sea *or in port* between a captain and his crew particularly in reference to the adjustment of wages *and the execution of contracts* and further that the Consuls, etc., may cause the arrest of all persons "making part of the crew, *in any manner whatever*, of ships of war or merchant vessels of this nation, who may be guilty or *be accused* of having deserted said ships and vessels, for the purpose of sending them on board *or back* to their country." The Treaty further provides in Article XII thereof that on the written request by the consular officer for the arrest of the deserter and on exhibition of any official document showing that he belonged to the crew, the "*delivery* " *of the deserters cannot be refused* unless it should be duly proved that they are citizens of the country where their extradition is demanded at the time of their being inscribed on the crew list."

The Treaty of 1871 with the German Empire in Article XIII thereof contains similar provisions, conferring jurisdiction of all matters of difference between a captain and his crew on the consular courts and continues:

> " Neither any court or authority shall on any pre-
> " text interfere in these differences."

The Treaty further provides, in Article XIV thereof, that the consul cannot be called on to make affidavit to support his application for the arrest of a deserter.

The Treaty of 1878 with Italy, in Article XIII thereof, confers express authority on consular officers *to arrest* persons forming part of the crew of vessels of their nation guilty of or *charged* with desertion in order to

return them to their vessels or to send them back to their country. The consular officers, instead of personally arresting the deserters, *may* apply to the local authorities for assistance. Upon the written request of the consul, supported by the exhibition of an official document showing that the person whose arrest is sought without the support of any further proof or the exaction of any oath, the deserter not being a citizen or subject of the country in which the demand is made at the time of their shipment, *shall be given up.*"

Dispute having arisen between Italy and the United States with regard to the jurisdiction of consular courts, an agreement was reached in 1881 modifying the Treaty of 1878. It was then agreed that the consular courts should *alone* take cognizance of matters of difference between a captain and his crew, and that trial courts should not interfere under any pretext except to preserve the peace.

XXI.—That in all the Treaties entered into by the United States, it is apparent that it is the intention of the contracting parties to confer on the consular courts exclusive jurisdiction of all matters of difference between the captain of a vessel and members of his crew, and to assist such consular courts in the apprehension of deserters, and to leave undiminished the discipline which the captain of a ship of war is entitled to maintain among the crew of the same.

XXII.—That the contracting parties to the Treaty between the United States of America and the Empire of Russia have construed it as extending to the case of the relator herein and as requiring his apprehension and surrender to your petitioner, the latter Government by its attempt to obtain the relator and by the prosecution of this application, the former by the action of its Executive through the office of the Attorney General in suggesting to the Honorable the Judges of the Circuit Court of Appeals for the Third Circuit that the relator herein

should be remanded to the custody of the Keeper of the Philadelphia County Prison to await the order of your petitioner.

XXIII.—That this case involves the determination of international questions of great importance, to wit:

First: The construction of a Treaty between the United States of America and the Empire of Russia;

Second: The determination of the jurisdiction of consular courts;

Third: A determination of the question as to whether good faith and international comity, aside from all treaty stipulation, do not require that this country shall not afford an asylum to deserters of a foreign navy admitted into the country while in such foreign service with the assent of the Executive of this country for the express purpose of manning a vessel of war admittedly belonging to a friendly country.

Wherefore, your petitioner prays that a writ of *certiorari* may issue herein to the Circuit Court of Appeals for the Third Circuit, directing that this cause be certified to this the Supreme Court of the United States for its review and determination.

Dated April 8th, 1901.

W. R. Tucker
Petitioner.

Eastern District of Pennsylvania

WILLIAM A. TUCKER, being duly sworn, says, that he is the petitioner above named; that the foregoing petition is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this 9th day of April, 1901.

W. R. Tucker

Charles E. Lex
Notary Public

FILED
APR 22 1901
JAMES H. McKENNEY,
Clerk.

903

No. 642.

Brf. of Fuller & Lewis for Petitioner.

SUPREME COURT OF THE UNITED STATES.

Filed April 22, 1901.

ROBERT C. MOTHERWELL, JR., Keeper of the PHILADELPHIA COUNTY PRISON, and Captain VLADIMIR BEHR, Master of the Russian Cruiser VARIAG,

Appellants,

against

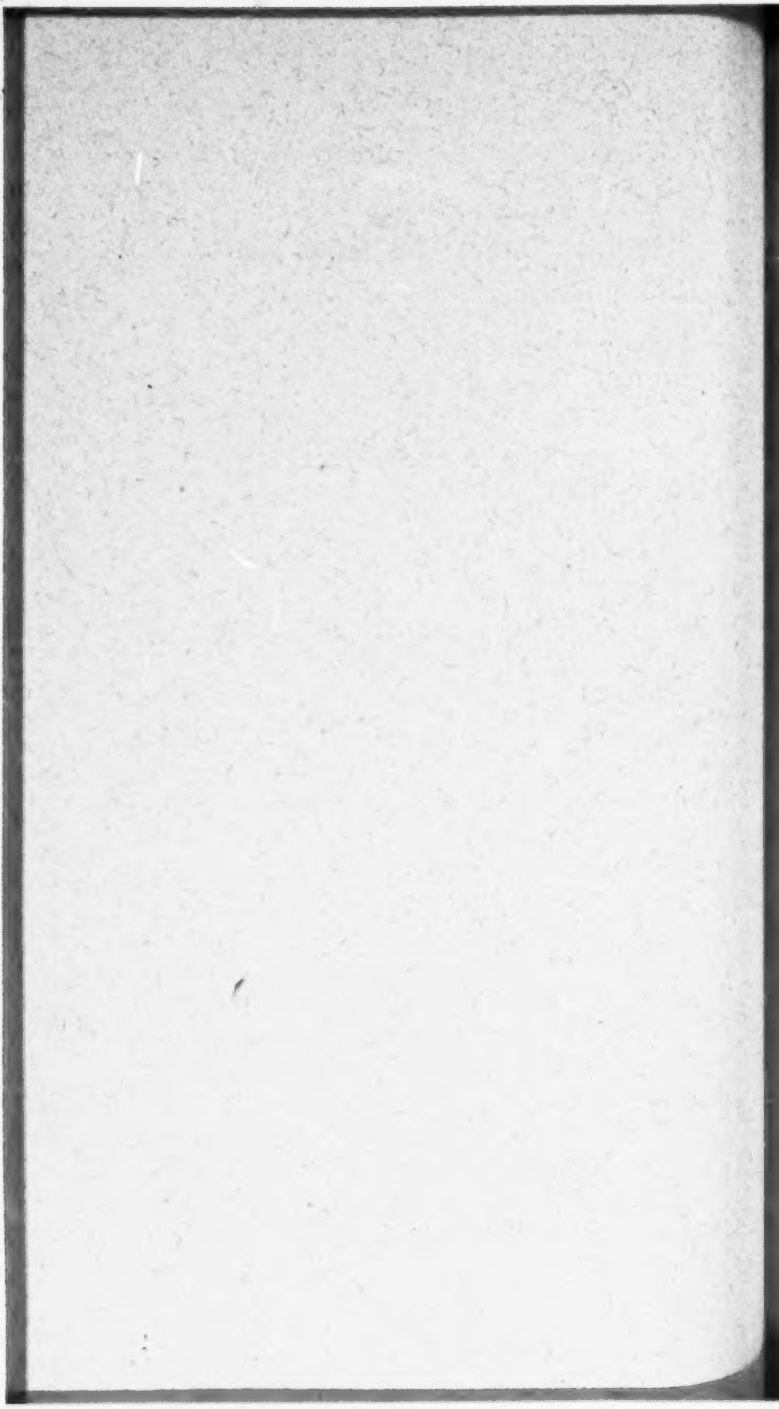
THE UNITED STATES OF AMERICA, ex rel., LEO ALEXANDROFF,

Appellee.

Brief in Support of Application.

PAUL FULLER,
JOHN F. LEWIS,
of Counsel for Petitioner.

LIVINGSTON MIDDLEDITCH CO., 65 DUANE ST., N. Y.



Supreme Court of the United States.

MOTHERWELL AND ORS.

v.

UNITED STATES *ex rel.* ALEXANDROFF.

Brief in support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

I.

This application answers all the requirements laid down by this Court in the case of LAU OW BEW, 141 U. S., 583 and 144 U. S., 53–58.

The question involved is of "great gravity and importance" and is "a matter of international concern" (141 U. S., 587–588).

It concerns the attitude which the local authorities should observe towards the military or naval forces of a friendly nation permitted to enter the ports of this country; whether such forces remain under the direct and immediate command of their soverign, and exempt from the civil and criminal jurisdiction of our courts, free from the exercise of our sovereignty, or whether such forces are on the other hand subject to the interference of the local authorities as if they were private citizens, liable to disintegration and dispersal, liberated from the discipline to which they were amenable when per-

faith, and it is stated that the general statutory provisions descriptive of the ordinary jurisdiction of the judicial tribunals should not be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction (p. 146).

The right so asserted by this Court does not depend upon any Treaty; the immunity results from the implied license to enter our ports and is a principle of public law. This principle has been embodied and re-stated in the Treaty between the United States and Russia fully quoted in the Petition for the writ of certiorari, which provides that Consular officers shall "sit as "judges in such differences as may arise between "the captains and crews of the vessels belonging to the nation whose interests are committed to their charge *without the interference "of the local authorities*" (Art. VIII), and that such Consular officers may "require the *assistance* of the local authorities" for the arrest of deserters, and that "such deserters when arrested shall be placed at the disposal of the said Consular officers" (Art. IX).

See also as to exclusive jurisdiction of Consular officers and the observance of this right by our courts:

Wildenhus Case, 120 U. S., 12.
The *Belgenland*, 114 U. S., 364.
The *Belvidere*, 90 Fed. Rep., 109.
The *Amalia*, 3 Fed. Rep., 653–654.

In a case which arose during the Crimean war, where a writ of *habeas corpus* was issued

and served at the port of San Francisco upon a British commander who had come into the port with a Russian prize, the commander disregarded the writ and sailed away with the prisoners in whose behalf the writ had been issued. Complaint having been made to the political authorities against this breach of international courtesy and disregard of the judicial jurisdiction the case was referred to the Attorney General; the action of the British commander was sustained and the jurisdiction of the Court to interfere with the commander of a foreign war vessel, in the exercise of the duty devolving upon him as such, was denied.

Belligerent Asylum, VII Atty. Gen'l. Op., p. 122.

IV.

The grounds upon which this international policy was disregarded and the principle of public law so clearly laid down in the case of the *Exchange* denied its proper application are various and are not uniform.

They are extremely technical and give to the rights and duties arising from friendly international relations,—the full and fair observance of which are so essential to their maintenance,—a narrow construction totally at variance with the broad and liberal interpretation which has hitherto been the rule.

They met, moreover, with a strong dissent

from one of the judges of the Circuit Court of Appeals.

We will briefly consider them:

First.—The District Court, *McPherson, J.*, conceding that the relator was a deserter from the Russian Naval Service, that the proceedings were regular, involving no dispute of fact, that the relator was one of a squad of seamen intended as portion of the crew of the Variag. (*p. 33, Printed Record*) holds:

A. That the Variag is an unfinished vessel, intended as a Russian Cruiser, but which may never acquire that character. (*p. 34, Record.*) Article 10 and Article 12 of the contract for the construction of the vessel (*Record, pp. 23-24*) shows that the ownership of the vessel was in the Russian Ministry of Marine. The vessel was launched in the fall of 1899—(*p. 15*) the relator did not desert until April, 1900 (*p. 6*).

Here is a vessel owned by the Russian Ministry of Marine launched and afloat, with a captain of the Russian Navy assigned to its command, and simply because it was "unfinished" it is held to have forfeited that immunity from foreign interference upon which the good understanding between nations so largely rests.

B. That the relator was not yet a member of her crew; that the vessel had no such organization in the sense intended by the Treaty (*p. 34*).

Yet the learned judge also holds that "the prisoner and certain associates were ordered to Philadelphia to serve as part of the cruiser's complement" (*p. 34*) but insists that technically they did not yet form a crew because "they had not yet begun that service, and may never be called upon to perform it" (*p. 34*).

The relator gave testimony relevant to the question whether or not he had "begun the service" as a member of the crew.

"I entered the service [the Russian "Navy] in 1896. [Since I have been in "America] I lived together with the crew "of the Russian ship that is in process of "construction (*p. 5*). I was never asked "to become a member of the crew [of the "Variag] but was simply sent there."

"Q. What was your treatment at the "hands of *the superior officers of the crew* "since you have been in this country?

"A. I cannot say that the superior officer "behaved very well toward me (*p. 5*).

"*I left the crew* on the 20th of April (*p. 6.*)

"I lived with the crew from October to "April. I received support from the Rus-"sian Government, but I claim I did not "ask for it. I was simply compelled to "serve and compelled to receive the wages.

"Q. Did you perform the duties required "of you as a member of this crew while you "were here between October and April?

"A. In so far as it was my place as as- "sistant physician" (*p. 9*).

Here we have an enlistment in the naval service; a "sending" of the enlisted man to form part of the crew, his living with the crew, subject to a superior officer; his support and payment of wages by the Russian Government, his service under compulsion and his performance of the duties consistent with his assignment. But because the crew had not yet formed their home aboard the vessel, it is held that there was no such "organization" as the Treaty contemplated and that the "service was not yet begun." It is under the shelter of such a technicality that a friendly country is held absolved from preserving to the naval authorities of another friendly country the right to maintain that discipline without which neither navies nor commerce could be held together.

C. That "the evidence specifically described "and made necessary by the Treaty itself "has not been produced;" that "no reg- "ister or roll of the crew or other official "document substantiating the Consul's "averment has been produced" (p. 34).

The first answer to this is that the Treaty does not require the production of these

papers before the Court on a return to a writ of *habeas corpus;* it authorizes the Consuls when applying to the "local authorities" for aid in the arrest of deserters to prove "that such individuals formed part of the crews" by the simple "*exhibition* of the register of vessels, the rolls of the crews or other official documents" (*Art. IX. of Treaty, p. 34 of Record*). These original documents, unsupported by any oath or any testimony are sufficient; they are not to be left with the authorities but simply "*exhibited.*" *Non constat* but that they were so exhibited to the Commissioner before he issued his warrant in aid of the jurisdiction of the Vice-Consul and Captain of the *Variag.*

On the contrary the record shows by admission that "the proceedings have been in "accordance with the Treaty and the Re-"vised Statutes" (*p. 17*).

To be "in accordance with the Treaty" is to admit that "the evidence specifically "described and made necessary by the "Treaty," to use the language of the Judge at *p. 34*, was forthcoming at the proper time and place, to wit, before the authorities whose aid was invoked.

The second answer to the Judge's statement that no register, roll or "other official document" was produced (*p. 34*) is that Counsel for the Vice-Consul and Captain tendered in evidence the passport issued by

the Government authorizing the men composing the crew to come to the United States, in proof of the fact that the relator came here as a portion of the crew of the cruiser.

The Court considered it unnecessary, stating this ground: "He came here as a "member of the Russian Navy, ordered "here to become one of the crew of the "cruiser *Variag*, and he came for that ex- "press purpose."

Here therefore was "an official document" tendered in evidence, and a statement by the Court that the fact to be proved by the document was unquestionably established.

The third answer in regard to the fatal character of the omission to present the register of the vessel or other official document, is that the exhibition of these documents and their acceptance as conclusive proof of the status of the person charged with desertion is an amplification and not a restriction of the methods of proof usually required in analogous prosecutions, and that such methods of proof become entirely unnecessary when as in the present there is such a practical admission by the relator, of the fact to be established.

Second.—*Dallas, J.*, of the Circuit Court of Appeals insists upon the unfinished condition of the cruiser, and upon the fact that although the

men had been assigned to the service of the crew "they had not yet entered upon it" and consequently no crew was yet "in being." Although the cruiser had been launched, the fact that the deserter had not actually been on board of her, (he had performed his duty of assistant physician nevertheless) was considered an important element, as though a crew could not be enlisted until actual sailing and as though enlistment for service on board a vessel did not actu ally make the enlisted man one of the members of that vessel's crew. On these refinements was made to depend the performance of an international duty of the highest order, and under these refinements was buried that comity that makes for universal peace.

The rule of comity as laid down by this Court in the case of the *Exchange* is repudiated, and the right to assistance in the recapture of a deserter is held to depend solely upon the Treaty, which is accepted as indicating "a change of law."

The Treaty, it is held, would have been applicable, had the relator been a member of a crew and had he deserted from a Russian ship, but there being no crew and no ship, the Treaty can not be invoked and therefore neither under the Treaty nor under the rule of comity can the Russian authorities get any relief.

Such comity as is recognized is confined to immunity from the assertion of jurisdiction.

But it is insisted that no such jurisdiction was asserted or exercised; that the jurisdiction was invoked by the Russian Vice-Consul on the assumption of rights created by the Treaty, and that assumption being unfounded the Court had no recourse but to order the prisoner's release.

This we submit is an error. All that the Vice-Consul did was to call for the assistance of the U. S. Commissioner in making the arrest. It is conceded in the Record that this proceeding was regular and in accordance with the Treaty; it was successful, the deserter was arrested, held, committed and placed at the disposal of the Vice-Consul.

At this juncture the District Court intervened, asserted and exercised jurisdiction over a member of the crew of the Russian cruiser, removed him beyond the reach of the Vice-Consul or the Captain of the cruiser, declared his arrest and detention unlawful, and set him at liberty. This was an active interference such as is prohibited by the Treaty; it was an infringement of the jurisdiction of the Vice-Consul guaranteed by the Treaty and it worked an injury to the discipline of the crew of a war vessel of a friendly power, to that extent crippling the efficiency of its naval forces peaceably visiting our country, in violation of the comity which independent of any Treaty assures to friendly nations the domination of their forces.

All this was done on the assumption that al-
" though " Capt. Behr and those who came with

"him were members of the Russian Navy," yet, "as an aggregation they were not an integral "component of it." This we respectfully submit is a close technicality such as should be discarded in weighing the privileges of friendly national forces relying upon the hospitality of our harbors.

Especially in presence of the action of the Executive Department of the Treasury directing the proper authorities "to admit without exam- "ination *the detail of one officer and fifty-three* "*regular sailors* whom you state have been *de-* "*tailed to this country for the purpose of partial-* "*ly manning the cruiser now under construc-* "*tion*," etc. (p. 18, Record).

It was precisely "as an aggregation"—"a de- "tail of one officer and fifty-three regular sailors" —that this permission was granted, but under the decision which we seek to have reviewed the Russian Government is to lose the benefit of treaty and of comity, because this particular Executive Department is not considered to have done anything but "an act of common courtesy" which cannot be construed into "a permission for their "landing."

Third.—*Gray, J.*, Circuit Court of Appeals, while agreeing that the arrest under the Treaty cannot be maintained, admits that Captain Behr "was in command of the detail of men belong- "ing to the Russian Navy and awaiting the "completion of the ship of war *Variag*."

He holds that the obligations of public law or comity would apply "to any organized military "force, however small, provided it was large "enough to be susceptible of military organiza- "tion and of acting offensively or defensively. "In this case, therefore," he continues, "I am of "opinion that the detail of fifty-eight men, if "organized as part of the military and naval "force of Russia *coming here for the purpose* "*disclosed by the record*, might sufficiently pos- "sess the character that would so far as this "case is concerned, be entitled to receive and "enjoy the comity and privileges flowing from "such a permission * * if properly granted "by our Government."

Here we have a divergence of views between the two concurring judges upon a fundamental proposition: whether the body commanded by Captain Behr and including the relator was a body entitled to the exercise of the comity which would exempt it from local jurisdiction.

But the exercise of this comity is made dependent upon proper permission being given by the Executive for the foreign contingent to land upon our soil. And the plain language of the Secretary of the Treasury admitting the detail of regular sailors and their commander is considered inadequate.

"It falls far short," says Judge Gray, "of "conveying to this Court the information that "the requisite permission was granted by the "President."

It seems obvious that if the Presidential permission had been sufficiently established by the Treasury Department order, Judge Gray would have applied to the case the comity which he admits was due to a body duly authorized to land, and Judge Dallas in lieu of Judge Bradford would have been the dissenting member.

The point then justifies some discussion.

The permission, insists the Judge, must be express and unequivocal and cannot be implied. Yet the opinion admits "that a different rule "obtains in the case of ships of war of one sov-"ereign visiting the ports and waters of an-"other. There is an implied authority among "nations to tolerate this, and extend to such "visits an international comity, founded on "universal custom and usage among nations. "* * * Ships of war from their vagrant "character constantly demand the hospitality of "foreign waters. They were made to traverse "the waters of the world and all nations find "that their interests and security demand the "hospitality of foreign waters. * * *"

In the present case we do not rely upon this implied permission. There is a clear permission from one of the Executive Departments that the detail of "regular sailors" and officers may land for the specific purpose of manning a Russian cruiser.

No implication is needed; the leave is explicit. It is *prima facie* plain and sufficient.

It lies upon those who impugn it to overturn it. It is in the interest of good faith among

When we add to this the doubt which we believe is cast upon the correctness of the decision by the examination of it here presented, we confidently rely upon the assistance of this Court to set at rest a question of such moment, the present condition of which might well result in the cessation of the far-reaching industry of constructing foreign war vessels, of which the cruiser *Variag* is the first example.

We respectfully submit that the prayer of the petition should be granted and the Writ of Certiorari issued.

19 April, 1901.

PAUL FULLER,
JOHN F. LEWIS,
Of Counsel for Petitioner.

Office Supreme Court, U.S.
FILED
APR 27 1901
JAMES H. McKENNEY,
Clerk

No. 303

Appx. to Br. of Petitioners.

Filed April 27, 1901.

SUPREME COURT OF THE UNITED STATES

October Term, 1900.

WILLIAM R. TUCKER, Vice-Consul of Russia, at Philadelphia, Pennsylvania,

Petitioner,

against

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF.

ADDENDUM TO BRIEF IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI.

Being correspondence between the Naval Attaché of the Imperial Russian Embassy and the Secretary of the Treasury; also between the Russian Embassy and the Secretary of State, and between the Secretary of State and the Attorney General.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT, *April 6, 1901.*

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true and correct copies of the originals as appears from the files and records in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

L. J. GAGE.

[SEAL.] *Secretary of the Treasury.*

A.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

June 22, 1899.—No. 406.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: The Russian Ministry of Marine, of which in this country I am an official representative, some days ago has sent me a cable purporting that June 12th, on board some steamer, with destination for the United States, from St. Petersburg, Russia, had started a detail of one officer and twenty-nine (29) regular sailors, Imperial Russian Navy, for purpose of partially to man our cruiser, which at this time as you, Mr. Secretary, perhaps already know, is being under construction for the Russian Government, at Cramps' shipyard, Philadelphia, Pa.

Next week, or the one following the same, I expect this detail of our cruiser's crew will arrive in the port of New York, or that of Philadelphia, Pa., and by this reason I have the honor of respectfully requesting that the necessary orders to the proper United States authorities in the named ports be given, that the expected detail of the Russian cruiser's crew should be allowed to be landed without hindrance, and that of such permission given I should be kindly informed, to be able personally to attend to the business.

Hoping that my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,

(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 19,024. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *June 23, 1899.*

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 22d instant, No. 406, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioners of Immigration at the ports respectively of New York and Philadelphia, to admit without examination the detail of one officer and

twenty-nine regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's shipyard in Philadelphia, Pennsylvania.

The Collectors of Customs have also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,

(Signed) L. J. GAGE.
Secretary.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

September 24, 1899.—No. 557.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: Following the subject of my letter of June 22d last, and that of yours, No. 19,024, of June 23d, I have again the honor respectfully to request that the necessary orders to whom concerns, would be given for allowing admittance to the United States through the port of New York without examination the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's shipyard, in Philadelphia, Pa.

The arrival of that detail is by me expected about October 7th next. The name of S. S. Line and of the steamer permit me to advise at a later period.

Hoping my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,

(Signed) D. T. MERTVAGO.
Naval Agent,
Imperial Russian Embassy
to the United States, N. A.

No. 19,805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October 4, 1899.*

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioner of Immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramps' shipyard in Philadelphia, Pennsylvania.

The Collector of Customs has also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,

(Signed) O. L. SPAULDING,
Acting Secretary,
F. A. V.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

October 5, 1899.—No. 591.

Honorable O. L. SPAULDING,
Acting Secretary, Treasury Department,
Washington, D. C.

DEAR SIR: Your valuable letter of yesterday, communicating the orders of the Treasury Department of the United States, with regard to the detail of one officer and 53 regular sailors now expected by me to arrive to this country by the mail steamer of the American line, "St. Paul," duly received, and I am in haste to present our greatest appreciation of the courtesy extended to us in the case, of which the Russian Government will be informed at once for international reciprocity in politeness.

Yours, very respectfully,

(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 8600.

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files and records of this Department.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the Seal of the Department of State to be affixed.

Done at the City of Washington, this 26th day of April, A. D. 1901, and of the Independence of the United States of America the one hundred and twenty-fifth.

[SEAL.] JOHN HAY.

[Revenue stamp.]

[Translation.]

WASHINGTON, *July 24—August 6, 1900.*

MR. SECRETARY OF STATE:

The President of the Commission for the Supervision of the Construction of the Russian War Vessels in America has informed me that the authorities of Philadelphia have declined to surrender to the proper Russian authorities a deserter, Alexandre Lvoff, assistant surgeon of the cruiser of the first-class, "*Variag*," who was arrested by the said authorities at the request of Commandant Berg, and that the said Alexandre Lvoff has been released by order of Judge McFersen (McPherson) of Philadelphia.

Inasmuch as Commandant Berg's request was based on Article IX of the Treaty of Commerce concluded between Russia and the United States in 1832, I have the honor to

address Your Excellency with the request kindly to inform the authorities of Philadelphia that Assistant Surgeon Alexandre Lvoff was one of the crew of the cruiser of the first-class, "*Variag*," and that, having deserted his post of duty, he must be delivered to the Russian authorities, in accordance with the provisions of the above-mentioned treaty.

Accept, Mr. Secretary of State, etc.,

G. DE WOLLANT.

No. 102. DEPARTMENT OF STATE,
WASHINGTON, *August 11, 1900.*

Mr. G. DE WOLLANT,
etc., etc., etc.

SIR: I have the honor to acknowledge the receipt of your note of the 6th instant requesting the assistance of the Department to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears from your note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFerson.

In reply I beg to inform you that a copy of your note has been sent to the Attorney General with the request that, if consistent with his views, he instruct the proper United States district attorney to put himself in communication with the President of the Commission for the Supervision of the Construction of the Russian War Vessels in America, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty of 1832.

Accept, &c.

ALVEY A. ADEE,
Acting Secretary.

DEPARTMENT OF STATE,

WASHINGTON, *August 11, 1900.*

The Honorable The ATTORNEY GENERAL.

Sir: I have the honor to enclose herewith a copy of a note from the Russian Chargé d'Affaires requesting the Department's assistance to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears from the note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFersen (McPherson?).

I beg to request that, if consistent with your views, you will instruct the proper United States district attorney to put himself in communication with the President of the Commission for the Supervision of the Construction of the Russian War Vessels in America, mentioned in the note, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty.

I have the honor, etc.

ALVEY A. ADEE,
Acting Secretary.

[Enclosure]:

From Russian Chargé, No. 245, August 6, 1900.

No. 103. DEPARTMENT OF STALE,

WASHINGTON, *August 15, 1900.*

Mr. GRÉGOIRE DE WOLLANT,

etc., etc., etc.

SIR: Referring to your note of the 6th instant, relative to the case of Alexander Lvoff, Assistant Surgeon of the Russian cruiser *Variag*, who, it appears, was arrested as a deserter by the authorities at Philadelphia, and was re-

leased by order of Judge McPherson, and to this Department's reply of August 11th, advising you of the reference of the matter to the Attorney General, I have the honor to inform you that I am in receipt of a letter from that official, who states that he has directed the United States Attorney for the Eastern District of Pennsylvania to render all proper advice and assistance to the Russian authorities in aid of the enforcement of the stipulations of the treaty of 1832 upon the subject of the arrest and detention of deserters from ships of war and merchant vessels of each country in the country of the other.

The Attorney General calls attention to the fact that the correspondence does not give the name or address of the President of the Commission for the Supervision of the Construction of Russian War Vessels in America, and he asks that his name be furnished in order that the United States Attorney may be fully informed.

Accept, etc.

ALVEY A. ADEE,
Acting Secretary.

No. 105. DEPARTMENT OF STATE,
WASHINGTON, *August 22, 1900.*

M. DE WOLLANT, etc., etc., etc.

SIR: Referring to your note of the 6th instant, and to those of this Department of August 11th and 15th, relating to the arrest at Philadelphia as a deserter and the subsequent release of Alexander Lvoff, late Assistant Surgeon of the Russian cruiser *Variag*, I have the honor to enclose copy of the opinion of the United States District Court granting an order of discharge to the prisoner. In furnishing this copy to me the Attorney General adds that it appears that

an appeal on behalf of the Russian authorities has been taken from this judgment to the Circuit Court of Appeals, and that said Lvoff has been held in bail to await the final determination of the proceeding on appeal.

The Attorney General repeats the request communicated to you in my note of the 15th instant for the name and address of the President of the Commission of the Construction of War Vessels in America, in order that the United States Attorney may place himself in communication with that gentleman and render him all proper advice and assistance in his power.

Accept, etc.

ALVEY A. ADEE,
Acting Secretary.

Enclosure: Opinion of United States District Court as above.

* ———

No. 122. DEPARTMENT OF STATE,
WASHINGTON, *December 15, 1900.*

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 6th instant,* relative to the landing at Philadelphia of certain officers and men for the Russian war vessels *Variag* and *Revizan.*

Your note was at once referred to the Secretary of the Treasury, who replies as follows:

> "The Commissioner of Immigration at Philadelphia "has been directed to facilitate the landing of the sea- "men and officers referred to, and the Collector of "Customs will refrain from collecting the per capita

* For this note see insertion, *infra*, p. 13.

"tax from the steamship company. The said com-
"pany should be called upon to refund the amount paid
"to their Liverpool representative, in advance, for the
"head tax."

Accept, &c.

JOHN HAY.

(Translation.)

NEW YORK, *December 12/25, 1900.*

MR. SECRETARY OF STATE: The Imperial Ministry of the Russian Navy has just advised me that 213 seamen of the Imperial Fleet, accompanied by two officers, a monk, and a cook, have embarked at Liverpool on the ship *Belgenland*, bound for the port of Philadelphia, where they are expecting to arrive on the 16/29th instant.

In view of the fact that these seamen are sent hither to complete the crew of the Imperial cruiser *Variag*, I hereby pray Your Excellency to inform the Treasury Department of their arrival, so that they may land immediately upon the arrival of the vessel at Philadelphia.

I also beg Your Excellency to have the extreme kindness to allow the free entry of the boxes that are to arrive with the men and contain their personal effects and some articles shipped by the Ministry of the Navy, all for the cruiser *Variag*.

Lastly, I beg Your Excellency to take such steps as may be necessary for the return to the commanding officer of the tax imposed on immigrants, which is paid at the time of the sailing of the ship for the United States.

I embrace this opportunity, etc.,

CT. CASSINI.

No. 125. DEPARTMENT OF STATE,
WASHINGTON, *December 28, 1900.*

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 25th instant relative to the entry at Philadelphia of the officers, seamen, etc., for the Russian cruiser *Variag*.

In reply, I have the honor to quote for your information the telegram sent on the 27th instant by the Secretary of the Treasury to the Collector of Customs at Philadelphia, and also an extract from Mr. Gage's letter reporting his instructions to the Commissioner of Immigration at the same port:

"Admit to entry free of duty and without examination baggage of two hundred thirteen seamen, two officers, a chaplain, and a cook of new cruiser *Variag*, arriving per *Belgenland* on twenty-ninth instant, also articles shipped by Ministry of Russian Navy.

"The Commissioner of Immigration at Philadelphia has been directed to facilitate the landing of the seamen and officers referred to, and the Collector of Customs will refrain from collecting the per capita tax from the steamship company. The said company should be called upon to refund the amount paid to their Liverpool representative in advance for the head tax."

Accept, &c.

JOHN HAY.

29165

(This should have been printed on page 10, supra, immediately preceding Mr. Hay's note of December 15, 1900.)

(Translation.)

RUSSIAN EMBASSY, *23 November,—6 December, 1900.*

MR. SECRETARY OF STATE:

The Russian Minister of the Navy has just informed me that 224 sailors of the Russian Imperial fleet, accompanied by three officers, one doctor, and a commissary, embarked at London on the American Line steamer *Rhineland*, for Philadelphia, where they should arrive about the 16th of December instant.

In view of the fact that these sailors are in the present service of the Russian Government, and 211 of them have been sent to complete the crew of the Russian cruiser *Variag*, and the other 13 are under orders for the *Retvizan*, which is being built by the Cramps, of Philadelphia, I have the honor to request Your Excellency to have the extreme kindness to notify the Treasury Department of the approaching arrival of these sailors, and to request that they may be allowed to land, and that restitution may be made to the superior officer of the tax imposed on emigrants and paid at the time of their embarkation.

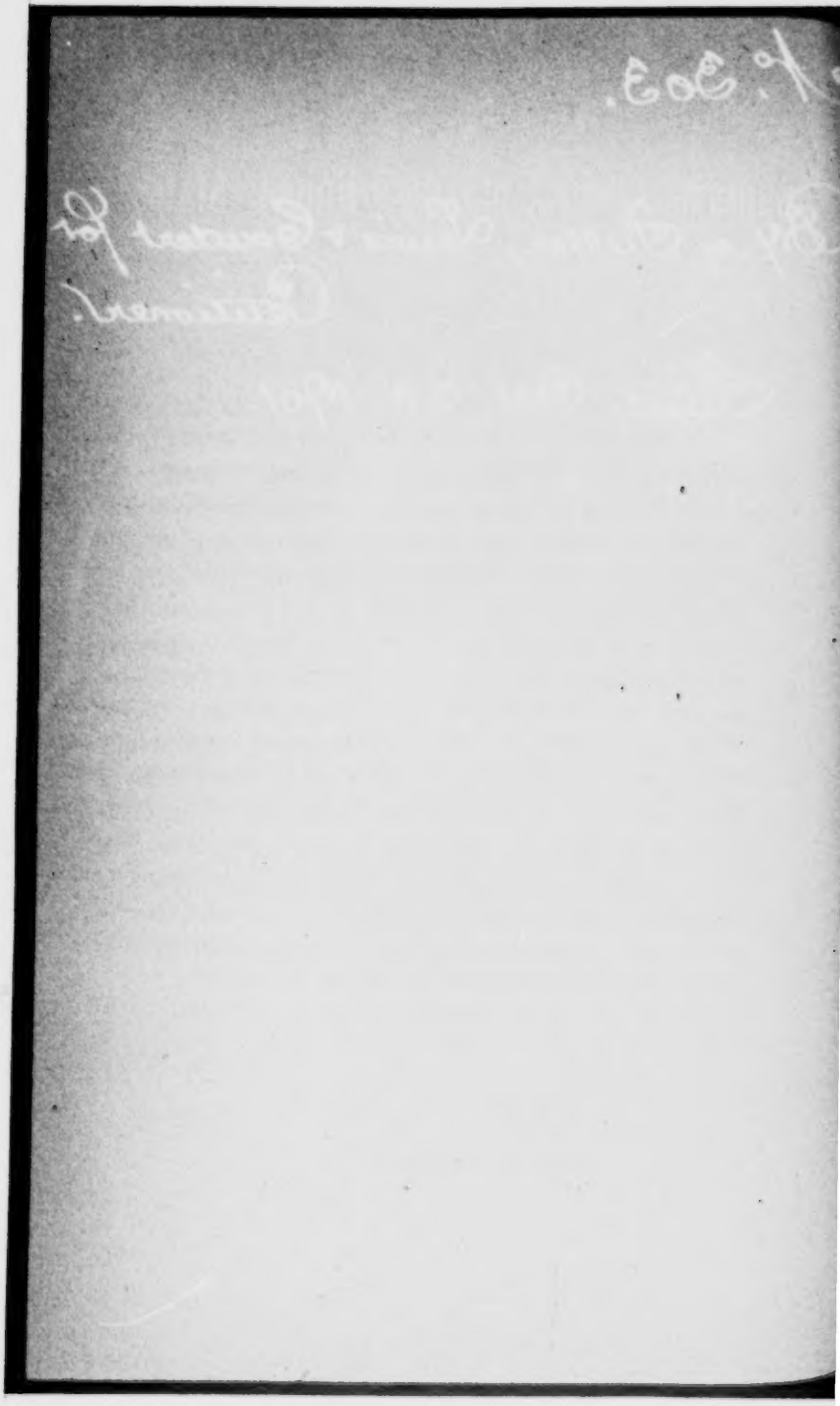
Accept, Mr. Secretary of State, etc.,

COUNT CASSINI.

His Excellency,

JOHN HAY,

Secretary of State.



No. 303.

OCT 28 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Brf. of Fuller, Lewis & Coudert for Petitioner.

OCTOBER TERM, 1901.

No. 303.

Filed Oct 23, 1901.

WILLIAM R. TUCKER, Vice-Consul of Russia,

Petitioner

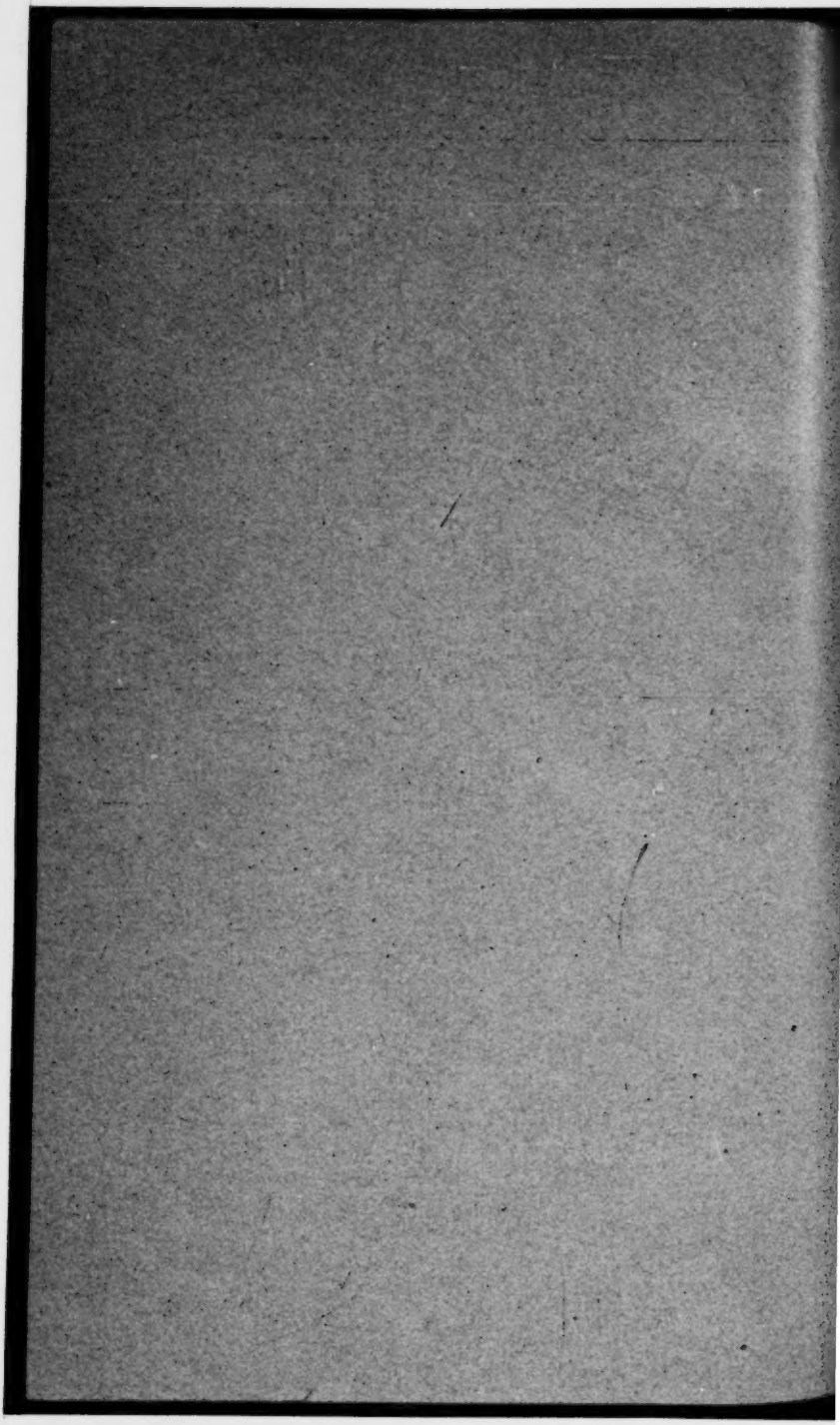
vs.

THE UNITED STATES. ex rel., LEO. ALEXANDROFF.

BRIEF FOR PETITIONER.

PAUL FULLER,
JOHN F. LEWIS,
F. R. COUDERT, JR.,
of Counsel for Petitioner.

LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.



29164

SUPREME COURT OF THE UNITED STATES.

OCT. TERM, 1901.

No. 303.

WILLIAM R. TUCKER,
Vice-Consul of Russia, Petitioner,

vs.

THE UNITED STATES *ex rel.*, LEO ALEXANDROFF.

Brief for Petitioner.

This case is brought before this Court pursuant to a Writ of Certiorari directed to the Circuit Court of Appeals for the Third Circuit (*p. 60, Rec.*).

Statement of Facts.

The Russian Ministry of Marine contracted on April 23rd, 1898, with the Cramp Ship and Engine Building Company of Philadelphia to construct for the Imperial Russian Government a protected cruiser (*p. 18, Rec.*). The vessel was to become at once, finished or unfinished, the exclusive property of the Russian Ministry of Marine and to be insured by the constructors in the name and for the benefit of the said Ministry of Marine (*p. 22, Rec., Arts. 11 and 12 of contract*). The vessel was to be completed in twenty months after the arrival at Philadelphia of a board of inspection provided for in Art. 13 of the contract (*p. 23, Rec.*).

Accordingly, as early as September, 1899, the Russian Government began to make provision for manning the cruiser with officers and seamen of the Imperial Russian

Marine, and on the 24th of September, 1899, applied to the Secretary of the Treasury for leave to land a detail of one officer and fifty-three regular sailors of the Imperial Russian Navy for the purpose of manning the Government's cruiser. This leave was duly accorded, and on several other occasions a like leave was accorded to land other details of officers and men for the same purpose. These applications were on some occasions made to the Secretary of State and by him referred to the Secretary of the Treasury as the appropriate Executive Department to grant the leave requested (*See Correspondence printed by leave of the Court*). This official correspondence attests facts which it is proper to disclose to this Court, and which by suggestion of the United States attorney were sought to be conveyed to the Circuit Court of Appeals (*pp. 42-44-45, Rec.*).

The relator Alexandroff was one of the members of the detail of one officer and fifty-three men mentioned in the permission to land of the 4th of October, 1899 (*p. of Correspondence*).

He had entered the Russian Navy in 1896, he arrived in this country on the 14th of October, 1899 (*p. 5, Rec.*).He came here in company with fifty-three men and accompanied by one officer; at the time he left Russia he knew he was coming here to be a member of the crew of the newly constructed cruiser (*p. 8, Rec.*). He lived with the crew of the Russian ship that was in process of construction, was subject to the superior officers of the crew (*p. 5, Rec.*) during all the time from October to April; received his equipment from the Russian Government, received support and wages from the Russian Government (*p. 8, Rec.*), performed the duties required of him as a member of the crew in so far as it was his place as an assistant physician; had his photograph taken with the other members of the crew (*p. 9, Rec.*).

He left the crew on the 20th of April, 1900 (*p. 6, Rec.*). The vessel had been launched in the fall of the preceding year—October or November (*p. 14, Rec.*).

Immediately after his desertion, affidavit of that fact was made by the Captain of the *Variag* (*pp. 6 &*

15, Rec.), and an application made by Mr. Tucker, the Russian Vice-Consul, to U. S. Commissioner Edmunds under the Treaty of 1832 between the United States and Russia (U. S. Stat., Vol. VIII, p. 444), for the arrest of the deserter, and thereupon the Commissioner issued his warrant for the apprehension of Alexandroff and subsequently committed him to the custody of the Marshal to be held subject to the order of the Vice-Consul or Captain (*p. 4 & p. 10, Rec.*).

Art. IX of the Treaty will be found in the Record, at p. 31, and in an Appendix hereto.

All these proceedings were formally regular (*p. 31, Rec.*). After the commitment of Alexandroff to the custody of the Marshal and the keeper of the Philadelphia prison, application for a writ of *habeas corpus* was made on his behalf and the writ issued (*pp. 1 and 3, Rec.*). The keeper produced the prisoner and made his return, producing the commitment (*p. 2, Rec.*). No traverse to the return was made.

A hearing was had before the District Court, and the prisoner was discharged (*pp. 31, 32, Rec.*).

An appeal was taken to the Circuit Court of Appeals (*p. 33, Rec.*); argument had October, 1900, and in February, 1901, the order of the District Court was affirmed.

On the appeal, the United States Attorney "at the instance of the Executive Department of the Government of the United States" filed a suggestion of certain facts (*p. 37, Rec.—p. 42-p. 46 & pp. 54-55, Rec.*).

Thereafter on petition of William R. Tucker, the Vice-Consul of Russia at Philadelphia, this Honorable Court issued its writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit (*p. 60, Rec.*).

The various grounds upon which the Russian authorities were refused the custody of the deserter as it had been awarded by the United States Commissioner are:

> That the *Variag* was not a completed ship (*p. 32*). That she was not a Russian ship (*p. 32*). That she had no organized crew (*pp. 32, 39*). That the relator was not a member of her

crew (*p. 32*). That the proof required by the Treaty was not produced to the Court (*p. 32*).

That although Alexandroff deserted the Russian naval service (*pp 32, 38, Rec.*) he did not desert the ship, having never been on board of her (*p. 39*). That the detail of officers and men from the Russian Navy "were not an integral component of it" (*p. 41, 42*). That they had no executive permission to land. That they were not recognized or admitted "as a distinctive part of its navy" (*p. 42*).

I.

The District Court had no jurisdiction to issue the writ of *habeas corpus* and liberate a member of the crew of a Russian war vessel from the custody of the captain of the crew or of the Russian Consular officer.

The right of the captain or commander of a crew forming part of the naval forces of a foreign nation to retain such command while in a friendly port by license express or implied was clearly laid down in the case of the EXCHANGE, 7 Cranch, 116, and the other cases cited at length in the dissenting opinion of Judge Bradford (pp. 48-49, Rec.). These cases recognise the universal exemption accorded to warships from the local jurisdiction. In the EXCHANGE the exercise of such a jurisdiction by the ordinary tribunals is characterized as a breach of faith, and it is stated that the general statutory provisions descriptive of the ordinary jurisdiction of the judicial tribunals should not be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction (pp. 146-7).

The right so asserted by this Court does not depend upon any Treaty; the immunity results from the implied license to enter our ports and is a principle of public law. This principle has been embodied and restated in the Treaty between the United States and

Russia, which provides that Consular officers shall "sit "as judges in such differences as may arise between "the captains and crews of the vessels belonging to "the nation whose intertsts are committed to their "charge *without the interference of the local authori-"ties*" (Art. VIII), and that such Consular officers may "require the *assistance* of the local authorities" for the arrest of deserters, and that "such deserters when arrested shall be placed at the disposal of the said Consular officers" (Art. IX).

The exclusive jurisdiction of Consular officers and the observance of this right has been further sustained in the cases of

Wildenhus Case, 120 U. S., 12.
The *Belgenland*, 114 U. S., 364.
The *Belvedere*, 90 Fed. Rep., 109.
The *Amalia*, 3 Fed. Rep., 653-654.

In a case which arose during the Crimean war, where a writ of *habeas corpus* was issued and served at the port of San Francisco upon a British commander who had come into the port with a Russian prize, the commander disregarded the writ and sailed away with the prisoners in whose behalf the writ had been issued. Complaint having been made to the political authorities against this breach of international courtesy and disregard of the judicial jurisdiction the case was referred to the Attorney General; the action of the British commander was sustained and the jurisdiction of the Court to interfere with the commander of a foreign war vessel, in the exercise of the duty devolving upon him as such, was denied.

Belligerent Asylum, VII Atty. Gen'l Op., p. 122.

II.

The treaty with Russia authorizes the consular officers to "require the assistance of the local authorities for "the search, arrest, detention, &c., of the deserters from

" the ships of war, &c. For this purpose they shall [1] " apply to the competent tribunals, judges and officers, "and shall [2] in writing demand said deserters, prov- " ing [3] *by the exhibition* of the registers of the ves- " sels, the rolls of the crews, or by other official docu- " ments that such individuals formed part of the crews; " AND THIS RECLAMATION BEING THUS SUBSTANTIATED, " THE SURRENDER SHALL NOT BE REFUSED."

Art. IX, Treaty of 1832.

The Treaty sets out *the fact to be established,* and prescribes *the measure and the method of proof,* and further prescribes that upon the fact being established by the proof prescribed, the matter is subject to no further dispute and surrender cannot be refused. No provision is made for a review of the question of fact and the intent seems evident to make the decision of that question of fact by the competent tribunal conclusive.

The return to the writ of *habeas corpus* showed that the relator had been apprehended and his custody awarded in accordance with the terms of the Treaty. This return was not traversed. There was no dispute of fact open to investigation: the fact had been determined by the tribunal vested with jurisdiction and discretion to determine it.

The *exhibition* of the register of the vessel or of the roll of the crew to the judicial officer is made conclusive as to the right of the consular representative to have the custody of the deserter.

No effort was made to show that the exhibition of these papers was not duly made to the U. S. Commissioner.

The District Court declared in its opinion that "the " proceedings before the Commissioner were formally " regular " (p. 31, Rec.).

This is equivalent to a statement that the proof required by the Treaty was duly produced, for otherwise the proceedings would have been clearly irregular.

The proceedings being regular, the proof declared

by the Treaty to be sufficient having been offered and passed upon by the competent tribunal, the discretion of that tribunal was not subject to review, and the writ should have been dismissed.

While the District Court further declared that "the testimony taken upon the hearing of this writ of *habeas corpus* discloses no dispute of fact" (*p. 31, Rec.*), it undertakes to pass upon the question of fact as to whether there ever was a crew of the *Variag,* and to determine that "there is no proof that her crew was "ever organized" (p. 31, Rec.). This is determining a question of fact adversely to the determination of the Commissioner; he was only authorized to return the deserter to the custody of the Consul on proof by exhibition of original rolls and registers that the relator formed part of the crew; there is no dispute as to the exhibition of such proof, for it is conceded "that the proceedings before the Commissioner were formally regular" (*p. 31, Rec.*), and no proof was tendered to controvert the fact of such exhibition to the Commissioner.

In other words, the Commissioner had before him the formal proof which the Treaty declared conclusive and upon production of which it enacted that "the surrender shall not be refused;" the testimony taken on the *habeas corpus* hearing disclosed no dispute of fact (*p. 31, Rec.*), and yet the action of the Commissioner is interfered with and set aside on the basis of a fact totally at variance with the fact as held by him.

He passed on the facts, in proceedings the regularity of which is admitted; presumably, therefore, upon the evidence specifically pointed out in the Treaty as conclusive; and under these circumstances his action should not be subject to review.

The judgment of a magistrate in proceedings for extradition that the accused is guilty of the act charged and that it constitutes an extraditable offence cannot be reviewed on the weight of evidence, and is final unless palpably erroneous in law.

Ornelas *v.* Ruiz, 161 U. S., 502.

In extradition cases it has been repeatedly held that a writ of *habeas corpus* cannot be made to perform the functions of an appeal and that the questions to be determined are as to the jurisdiction and authority of the Commissioner to pass on the complaint and the legality of his warrant.

In re MacDonnell, Fed. Cas. 8, 772;
Ex parte Van Aernam, Fed. Cas. 16, 824.

It has again been held that on such a hearing it is competent for the Court to look into the testimony upon which commitments were made.

This was not done in the present case.

U. S. *v.* Bates, Fed. Cas. 14, 544.

The jurisdiction of the Court is the thing to be looked into and the Court will examine the proceedings sufficiently to determine that.

Ex parte Farley, 40 Fed. Rep., 66.

On a petition for discharge of one arrested as a deserter on the ground that he was under sixteen when he enlisted and was induced to enlist by fraud, the return denying the fraud and presenting the written consent of his father and his own sworn statement that he was of age sufficient to enlist was taken as conclusive as to all the facts therein set forth, it having been neither demurred to nor denied.

In re Lawler, 40 Fed. Rep., 233.

III.

It is conceded that the comity extended to war vessels of a friendly nation entitled the commanding officer of the Russian naval force to the custody of the deserter which had been restored to him by the action of the U. S. Commissioner, if the force in question was "organized as part of the military and naval force of Russia coming here for the purpose disclosed in the

record" if the permission was "properly granted by the Government" (*Gray, J., p. 44*).

And it is further conceded that "if the Russian Government had requested their admission as a distinctive part of its navy, and that request had been acceded to by the Executive Department" (*p. 42*), then "Capt. Behr and those who came with him as members of the Russian navy" should be considered as "an aggregation—or integral component of it" (*p. 41*).

The only doubt remaining, therefore, was as to the character of the permission under which the detail of officers and men landed in the United States, the Court holding the permission given through the Secretary of the Treasury, insufficient to establish such executive leave as would attest at one time the national character of the body admitted and give to it the immunities flowing from such a permission duly accorded by the "sovereign of the soil."

This doubt, the existence of which alone prevented the Court below from applying to the case the exercise of the comity which would restore the deserter to his crew, is set at rest by the full correspondence printed by leave of the Court and which supplements the suggestion of the District Attorney and makes clear the entire situation.

A.

Every letter attests that the officers and men for whom permission to land is sought form part of the Russian Navy, according to the requirement laid down in the opinion of Judge Dallas (*p. 41*).

The first letter of June 22, 1899, from the official representative of the Russian Ministry of Marine and attaché to the embassy (*Corresp., p. 1*), to the Secretary of the Treasury, refers to "a detail of one officer and twenty-nine regular sailors, Imperial Russian Navy, for purpose of partially to man our cruiser."

A "detail" is a well known term in military nomenclature. It signifies a part of an organized military body, a squad or detachment of such designated or detailed to a particular service.

The second letter of September 24, 1899 (*Corresp., p. 4*), refers again to "the detail of one officer and fifty-"three regular sailors, Imperial Russian Navy, &c." (This is the detail comprising the relator Alexandroff.)

The third letter, October 5, 1899 (*Corresp., p. 6*), thanks the Secretary for the leave granted to land the "detail of one officer and fifty-three regular sailors, "of which courtesy 'the Russian Government will be at "once informed, for international reciprocity in polite-"ness.'"

B.

A similar application made by the Russian Ambassador directly to Secretary of State (*p. 11, Corresp.*) alludes in like terms to "sailors of the Russian Imperial fleet," and was at once referred by the Honorable Secretary of State to the Secretary of the Treasury and the permission granted by the latter was duly reported by the Secretary of State. This circumlocution was again gone through with for the last contingent of seamen (*p. 12, Corresp.*), and again the Secretary of State referred to the Secretary of the Treasury and reported the permission granted by the latter.

This shows in the first place that the Secretary of the Treasury was the proper organ of the Executive in granting the permission, and secondly that his action in the premises received the sanction of the Secretary of State, the more customary channel of communication with foreign powers.

IV.

The grounds upon which this internationl policy was disregarded and the principle of public law so clearly laid down in the case of the *Exchange* denied its proper application are various and not uniform.

They are extremely technical and give to the rights

and duties arising from friendly international relations,—the full and fair observance of which are so essential to their maintenance,—a narrow construction totally at variance with the broad and liberal interpretation which has hitherto been the rule.

They met, moreover, with a strong dissent from one of the judges of the Circuit Court of Appeals.

We will briefly consider them:

First.—The District Court, McPherson, J., conceding that the relator was a deserter from the Russian Naval Service, that the proceedings were regular, involving no dispute of fact, that the relator was one of a squad of seamen intended as portion of the crew of the *Varing* (*p. 33, Record*), holds:

A. That the *Varing* is an unfinished vessel, intended as a Russian Cruiser, but which may never acquire that character (*p. 32 Record*).

Article 10 and Article 12 of the contract for the construction of the vessel (*Record. p. 22*) shows that the ownership of the vessel was in the Russian Ministry of Marine. The vessel was launched in the fall of 1899 (*p. 14*)—the relator did not desert until April, 1900 (*p. 6*).

Here is a vessel owned by the Russian Ministry of Marine, launched and afloat, with a captain of the Russian Navy assigned to its command, and simply because it was "unfinished" it is held to have forfeited that immunity from foreign interference upon which the good understanding between nations so largely rests.

B. That the relator was not yet a member of her crew; that the vessel had no such organization in the sense intended by the Treaty (p. 39).

Yet the learned judge also holds that "the prisoner and certain associates were ordered to Philadelphia to serve as a part of the cruiser's complement" (pp. 31-32), but insists that technically they did not yet form a crew because "they had not yet begun that service, and may never be called upon to perform it" (p. 32).

The relator gave testimony relevant to the question whether or not he had "begun the service" as a member of the crew.

"I entered the service [the Russian Navy] in 1896. "[Since I have been in America] I lived together with "the crew of the Russian ship that is in process of con- "struction (p. 5). I was never asked to become a "member of the crew [of the *Variag*], but was simply "sent there" (p. 5).

"Q. What was your treatment at the hands of *the "superior officers of the crew* since you have been in "this country?

"A. I cannot say that the superior officer behaved "very well toward me (p. 5).

"*I left the crew* on the 20th of April (p. 6).

"I lived with the crew from October to April. I "received support from the Russian Government, but "I claim I did not ask for it. I was simply compelled "*to serve* and compelled to receive the wages (p. 8).

"Q. Did you *perform the duties required* of you "as a member of this crew while you were here between October and April?

"A. In so far as it was my place as assistant phys- "ician" (p. 9).

Here we have an enlistment in the naval service; a "sending" of the enlisted man to form part of the crew, his living with the crew, subject to a superior officer; his support and payment of wages by the Russian Government, his service under compulsion and his performance of the duties consistent with his assignment. But because the crew had not yet formed their home aboard the vessel, it is held that there was no such organization" as the Treaty contemplated and that the "service was not yet begun." It is under the shelter of such a technicality that a friendly country is held absolved from preserving to the naval authorities of another friendly country the right to maintain that discipline without which neither navies nor commerce could be held together.

C. That "the evidence specifically described and made "necessary by the Treaty itself has not been produced;" that "no register or roll of the crew or other official "document substantiating the Consul's averment has "been produced" (p. 32).

A first answer to this is that the Treaty does not require the production of these papers before the Court on a return to a writ of *habeas corpus;* it authorizes the Consuls when applying to the "local authorities" for aid in the arrest of deserters to prove "that such individuals formed part of the crews" by the simple "*exhibition* of the register of vessels, the rolls of the crews or other official documents" (Art. IX of Treaty, Appendix hereto). These original documents, unsupported by any oath or any testimony are sufficient; they are not to be left with the authorities but simply *"exhibited". Non constat* but that they were so exhibited to the Commissioner before he issued his warrant in aid of the jurisdiction of the Vice-Consul and Captain of the *Variag.*

No evidence was offered to show that this proof was not presented to the Commissioner; on the contrary, the record shows by admission that "the proceedings "have been in accordance with the Treaty and the Re-"vised Statutes (*p. 16, Rec., and Opinion, p. 31, Rec.*).

To be "in accordance with the Treaty" is to admit that "the evidence specifically described and made "necessary by the Treaty," to use the language of the Judge at p. 32, was forthcoming at the proper time and place, to wit, before the authorities whose aid was invoked.

The return to the writ produced the commitment which showed that it had been issued in accordance with the terms of the Treaty, and this return was never traversed.

A second answer to the Judge's statement that no register, roll or "other official document was produced" (p. 32) is that counsel for the Vice-Consul and Captain tendered in evidence the passport issued by the Government authorizing the men composing the crew

to come to the United States, in proof of the fact that the relator came here as a portion of the crew of the cruiser.

The Court considered it unnecessary, stating this ground: "He came here as a member of the Russian "Navy, ordered here to become one of the crew of the "cruiser *Variag*, and he came for that express purpose" (*p. 16, Rec.*).

Here therefore was "an official document" tendered in evidence, and a statement by the Court that the fact to be proved by the document was unquestionably established.

A *third answer* in regard to the fatal character of the alleged omission to present the register of the vessel or other official document, is that the exhibition of these documents and their acceptance as conclusive proof of the status of the person charged with desertion should be considered an amplification and not a restriction of the methods of proof usually required in analogous prosecutions, and that such methods of proof become entirely unnecessary when as in the present case there is such a practical admission by the relator, of the fact to be established.

Second.—*Dallas, J.*, of the Circuit Court of Appeals, insists upon the unfinished condition of the cruiser, and upon the fact that although the men had been assigned to the service of the crew "they had not yet entered upon it," and consequently no crew was yet "in being" (*Rec., p. 39*). Although the cruiser had been launched, the fact that the deserter had not actually been on board of her, (he had performed his duty of assistant physician nevertheless) was considered an important element, on the theory that a crew could not be enlisted until actual sailing and that enlistment for service on board a vessel did not actually make the enlisted man one of the members of that vessel's crew. On these refinements was made to depend the performance of an international duty of the highest order, and under these refinements was buried that comity that makes for universal peace.

The rule of comity as laid down by this Court in the case of the *Exchange* is repudiated, and the right to assistance in the recapture of a deserter is held to depend solely upon the Treaty, which is accepted as indicating "a change of law."

The Treaty, it is held, would have been applicable, had the relator been a member of a crew and had he deserted from a Russian ship, but there being no crew and no ship, the Treaty can not be invoked and therefore neither under the Treaty nor under the rule of comity can the Russian authorities get any relief.

Such comity as is recognized is confined to immunity from the assertion of jurisdiction, and it is insisted that no such jurisdiction was asserted or exercised; that it was the Russian Vice-Consul who invoked the jurisdiction of the Court on the assumption of rights created by the Treaty, and that assumption being unfounded the Court had no recourse but to order the prisoner's release.

This we submit is an error. All that the Vice-Consul did was to call for the assistance of the U. S. Commissioner in making the arrest. It is conceded in the Record that this proceeding was regular and in accordance with the Treaty; it was successful, the deserter was arrested, held, committed and placed at the disposal of the Vice-Counsul.

At this juncture the District Court intervened, asserted and exercised jurisdiction over a member of the crew of the Russian cruiser, removed him beyond the reach of the Vice-Consul or the captain of the cruiser, declared his arrest and detention unlawful, and set him at liberty. This was an active interference such as is prohibited by the Treaty; it was an infringement of the jurisdiction of the Vice-Consul guaranteed by the Treaty; it was an injury to the discipline of the crew of a war vessel of a friendly power, to that extent crippling the efficiency of its naval forces peaceably visiting our country and a violation of the comity which independent of any Treaty assures to friendly nations the domination of their forces.

All this was done on the theory that although "Capt. Behr and those who came with him were members of "the Russian Navy," yet, "as an aggregation they were "not an integral component of it" (*Rec., p. 41*). This we respectfully submit is a close technicality such as should be discarded in weighing the privileges of friendly national forces relying upon the hospitality of our harbors.

Especially in presence of the action of the Executive through the Treasury Department, directing the proper authorities "to admit without examination *the detail "of one officer and fifty-three regular sailors* whom you "state have been *detailed to this country for the pur- "pose of partially manning the cruiser now under con- "struction*," etc. (*Rec., p. 18*).

It was precisely "as an aggregation"—"a detail of "one officer and fifty-three regular sailors"—that this permission was granted, but under the decision which we seek to have reviewed the Russian Government is to lose the benefit of treaty and of comity, because this particular Executive Department is not considered to have done anything but "an act of common courtesy" which cannot be construed into a permission for their landing (*Rec., p. 42*).

Third.—*Gray, J.*, of the Circuit Court of Appeals, while agreeing that the arrest under the Treaty cannot be maintained, admits that Captain Behr "was in com- "mand of the detail of men belonging to the Russian "Navy and awaiting the completion of the ship of war "*Variag*" (*Rec., p. 43*).

He holds that the obligations of public law or comity would apply "to any organized military force, however "small, provided it was large enough to be susceptible "of military organization and of acting offensively or "defensively. In this case, therefore," he continues, "I am of opinion that the detail of fifty-eight men, if "organized as part of the military and naval force of "Russia *coming here for the purpose disclosed by the "record*, might sufficiently possess the character that

" would so far as this case is concerned, be entitled to " receive and enjoy the comity and privileges flowing " from such a permission * * * *if properly " granted by our Government* " (*Rec., p. 44*).

Here we have a divergence of views between the two concurring judges upon a fundamental proposition: whether the body commanded by Captain Behr and including the relator was a body entitled to the exercise of the comity which would exempt it from local jurisdiction.

The exercise of this comity is made dependent upon proper permission being given by the Executive for the foreign contingent to land upon our soil. The plain language of the Secretary of the Treasury admitting the detail of regular sailors and their commander is considered inadequate.

" It falls far short," says Judge Gray, " of conveying " to this Court the information that the requisite per- " mission was granted by the President " (*Rec., p. 45*).

It seems obvious that if the Presidential permission had been established by the Treasury Department order to the satisfaction of Judge Gray he would have considered the detail of fifty-eight men with its commander entitled to the comity which he admits was due to a body duly authorized to land, and Judge Dallas in lieu of Judge Bradford would have been the dissenting member.

The point then justifies some discussion.

The permission, insists the Judge, must be express and unequivocal and cannot be implied. Yet the opinion admits " *that a different rule obtains in the case of ships* " *of war* of one sovereign visiting the ports and waters " of another. There is an implied authority among " nations to tolerate this, and extend to such visits an " international comity, founded on universal custom " and usage among nations. * * * Ships of war " from their vagrant character constantly demand the " hospitality of foreign waters. They are made tra- " verse the waters of the world and all nations find that

" hospitality of foreign waters. They are made to tra-
" foreign waters (*Rec., p. 47*).

In the present case we do not rely upon this implied permission. There is a clear instruction from one of the Executive Departments to admit " the detail of one " officer and fifty-three regular sailors " for the specific purpose of manning a Russian cruiser.

No implication is needed; the leave is explicit. It is *prima facie* plain and sufficient.

It lies upon those who impugn it to overturn it. It is in the interest of good faith among nations and the preservation of friendly relations to sustain its obvious intent.

The only attack made upon it is that it does not purport to give Presidential permission.

It was long since established as a rule of action on the part of the political administration, and sustained by the courts, that the direction of the President is to be presumed in all instructions and orders issuing from the appropriate Departments.

In a communication to the President under date of August 31, 1855, Mr. Caleb Cushing, Attorney General, sets at rest any question on that point, citing the numerous precedents and judicial decisions already to be found (Op. Atty. Genl., VII, p. 453). Judge Bradford, who wrote the dissenting opinion in the present case, has so fully discussed the point, making reference to the adjudications, that we do not feel authorized to extend the discussion here. On one phase only of the contention will we detain the Court. It is contended that such permission is "an international compact which it (the Treasury Department) would " have no authority to make" (*Dallas, J., p. 42, Rec.*), and again, " that the Executive permission in question " is to be given by the President through the Secretary " of State, who is the sole organ of the Executive au-" thority for communication with foreign powers " (*Gray, J., p. 46, Rec.*).

Mr. Cushing, in the communication above referred to, cites the case of *Lockington* v. *Smith*, 1 Pet. C. C. R., 466 (Fed. Cases, No. 8448, Vol. 15, p. 758, 1817):

"It is to this Department (State) that reference must "be made for the official acts of the President in rela- "tion to those public measures which he may estab- "lish, and which are not more immediately connected "with the duties of some other Department. * * * "Nevertheless, the President, for the more easy and "expeditious discharge of his executive duties may di- "rect some other Department to make known the mea- "sures which he may think proper to establish. *They "are equally his acts whether they emanate from the "Department of State or from any other Department"* (VII Atty. Gen'l, p. 455). Apart, therefore, from the fact that the question of the admission of aliens into our Territory is "more immediately connected with the duties of" the Treasury Department than of any other, it is clear that through any Department the President is free to make known any official act.

If, however, any doubts remained as to the action of the Treasury Department being the act of the Executive and as to the intention of the Executive to permit the landing of a naval detail of regularly enlisted men forming part of the naval force of Russia, these doubts are dispelled by the correspondence of the Secretary of State as well as of the Secretary of the Treasury printed by permission of the Court and submitted by way of suggestion of the facts which are of public record.

This correspondence, to which reference has already been made at page 2, establishes (1) That the officer and sailors were an "integral component" of the Russian Navy, and (2) That the permission to land was approved by the State Department, thus dispelling all doubt upon the two points which controlled the judgment of the majority of the Court.

V.

By the testimony and admissions of Alexandroff it appears of record:

A. That he was a deserter from the Russian Imperial Navy (*pp. 5, 8, 9, Rec.*), he was sent here to

become a member of the crew of the Russian cruiser *Variag* (*p. 5, Rec.*); with an officer and fifty-three other sailors (*p. 8, Rec.*); he was subject to the superior officers of that crew (*p. 5*); he lived with that crew (*pp. 5, 8*); he left the crew on the 20th of April, 1900 (*p. 6*), and until then he received equipment, support and wages from the Russian Government (*p. 8*, Rec.) and performed the duties required of him as a member of the crew so far as it was his place as an assistant physician (*p. 9, Rec.*).

He was clearly therefore a member of a crew.

By the evidence of record it further appears that:

B. The *Variag* was a ship.

Mr. Cramp, testifying in June, 1900, declares that the vessel was launched in October or November of the preceding year (*p. 14, Rec.*). Alexandroff testifies that he left the crew on the 20th of April (1900)—(*p. 6, Rec.*). So that the construction had been afloat nearly six months when he deserted.

What is a ship has been the subject of judicial interpretation. "At the moment when she leaves the "ways, and her keel strikes the elements for which "she was originally designed: that is the moment of "her birth as a ship."

The Eliza Ladd, 8 Fed. Cases, 491.

C. Lastly she was a Russian ship.

The ownership of the vessel determines her national character.

U. S. *v.* Jenkins, Fed. Cases, No. 15,473.

The contract—(*p. 17, Rec.*) establishes the ownership beyond controversy. Art. 10 (*p. 22*) provides that the vessel whether finished or unfinished is the "exclusive property of Russian Ministry of Marine," and Art. 12 (*p. 22*) provides for its insurance "in the name of and for the benefit of the Russian Ministry of Marine."

D. The detail of an officer and fifty-three regular sailors of which Alexandroff was one, was a part of the Imperial Russian naval force, subject to its discipline. This naval force was duly permitted by executive authority to land in the United States for the express purpose of manning a Russian cruiser, and became thereby, to use the language of Judge Gray (*p. 44, Rec.*), "exempt from the operation of the civil and "criminal laws of the country."

Upon such a state of facts, both under the Treaty of 1832, and under the exercise of the comity "due where "an organized portion of the military force of one "sovereign enters upon the soil of another with the "permission of the latter" (*p. 44, Rec.*), the custody of Alexandroff as awarded by the U. S. Commissioner should not have been interfered with, the judgments of the Courts below should be reversed, and the relator remanded to the custody of the Vice-Consul of Russia at Philadelphia.

Dated 18 Oct., 1901.

PAUL FULLER.
JOHN F. LEWIS.
F. R. COUDERT, JR.,
of Counsel for Petitioner.

No. 303.

OCT 23 1901

JAMES H. McKENNEY, Clerk

Appx to Pet. of Fuller, Lawrence & Coudert for Cert.

Supreme Court of the United States

OCTOBER, TERM 1901.

Filed Oct. 23, 1901.

No. 303.

WILLIAM R. TUCKER, Vice-Consul of Russia,
Petitioner,

vs.

THE UNITED STATES, *ex rel.*, ALEXANDROFF.

CORRESPONDENCE

WITH

STATE DEPARTMENT AND TREASURY DEPARTMENT.

PRINTED UNDER ORDER OF COURT
OF 25 APRIL 1901.

LIVINGSTON MIDDLEDITCH CO., 65 DUANE ST., N. Y.

UNITED STATES SUPREME COURT.

WILLIAM R. TUCKER,
Vice-Consul, &c.,
Petitioner,

vs.

THE UNITED STATES, *ex rel.*
LEO ALEXANDROFF.

COPY OF MINUTES OF APRIL 25, 1901.

"On motion of Mr. F. R. Coudert, Jr., of counsel for "Petitioner, leave is hereby granted to submit certain "correspondence herein."

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT, April 6, 1901.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true and correct copies of the originals as appears from the files and records in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

L. J. GAGE,
Secretary of the Treasury.

[SEAL.]

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

June 22, 1899.—No. 406.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: The Russian Ministry of Marine, of which in this country I am an official representative, some days ago has sent me a cable purporting that June 12th, on board some steamer, with destination for the United States, from St. Petersburg, Russia, had started a detail of one officer and twenty-nine (29) regular sailors, Imperial Russian Navy, for the purpose of partially to man our cruiser, which at this time as you, Mr. Secretary, perhaps already know, is being under construction for the Russian Government, at Cramps' shipyard, Philadelphia, Pa.

Next week, or the one following the same, I expect this detail of our cruiser's crew will arrive in the port of New York, or that of Philadelphia, Pa., and by this reason I have the honor of respectfully requesting that the necessary orders to the proper United States authorities in the named ports be given, that the expected detail of the Russian cruiser's crew should be allowed to be landed without hindrance, and that of such permission given I should be kindly informed, to be able personally to attend to the business.

Hoping that my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,
(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 19,024. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,

WASHINGTON, D. C., June 23, 1899.

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 22d instant, No. 406, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioners of Immigration at the ports respectively of New York and Philadelphia, to admit without examination the detail of one officer and twenty-nine regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramps' shipyard in Philadelphia, Pennsylvania.

The Collectors of Customs have also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,
(Signed) L. J. GAGE,
Secretary.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

September, 24, 1899.—No. 557.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: Following the subject of my letter of June 22d last, and that of yours, No. 19,024, of June 23d, I have again the honor respectfully to request that the necessary orders to whom concerns, would be given for allowing admittance to the United States through the

port of New York without examination the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's shipyard, in Philadelphia, Pa.

The arrival of that detail is by me expected about October 7th next. The name of the S. S. Line and of the steamer permit me to advise at a later period.

Hoping my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,
(Signed) D. T. MERTVAGO,
Naval Agent,
Imperial Russian Embassy
to the United States, N. A.

No. 19,805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., October 4, 1899.

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioner of Immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramps' shipyard in Philadelphia, Pennsylvania.

The Collector of Customs has also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,
(Signed) O. L. SPAULDING,
Acting Secretary,
F. A. V.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

October 5, 1899.—No. 591.

Honorable O. L. SPAULDING,
Acting Secretary, Treasury Department,
Washington, D. C.

DEAR SIR: Your valuable letter of yesterday, communicating the orders of the Treasury Department of the United States, with regard to the detail of one officer and 53 regular sailors now expected by me to arrive to this country by the mail steamer of the American line, "St. Paul," duly received, and I am in haste to present our greatest appreciation of the courtesy extended to us in the case, of which the Russian Government will be informed at once for international reciprocity in politeness.

Yours, very respectfully,
(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 8600.

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files and records of this Department.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this 26th day of April, A. D. 1901, and of the Independence of the

United States of America the one hundredth and twenty-fifth.

[SEAL.] JOHN HAY.

[Revenue stamp.]

[Translation.]

WASHINGTON, July 24—August 6, 1900.

Mr. SECRETARY OF STATE:

The President of the Commission for the Supervision of the Constuction of the Russian War Vessels in America has informed me that the authorities of Philadelphia have declined to surrender to the proper Russian authorities a deserter, Alexandre Lvoff, assistant surgeon of the cruiser of the first-class, "*Variag*," who was arrested by the said authorities at the request of Commandant Berg, and that the said Alexandre Lvoff has been released by order of Judge McFersen (McPherson) of Philadelphia.

Inasmuch as Commandant Berg's request was based on Article IX of the Treaty of Commerce concluded between Russia and the United States in 1832, I have the honor to address Your Excellency with the request kindly to inform the authorities of Philadelphia that Assistant Surgeon Alexandre Lvoff was one of the crew of the cruiser of the first-class, "*Variag*," and that, having deserted his post of duty, he must be delivered to the Russian authorities, in accordance with the provisions of the above-mentioned treaty.

Accept, Mr. Secretary of State, etc.,

G. DE WOLLANT.

No. 102. DEPARTMENT OF STATE,
WASHINGTON, August 11, 1900.

MR. G. DE WOLLANT,
etc., etc., etc.

SIR: I have the honor to acknowledge the receipt of your note of the 6th instant requesting the assistance of the Department to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears for your note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFerson.

In reply I beg to inform you that a copy of your note has been sent to the Attorney General with the request that, if consistent with his views, he instruct the proper United States district attorney to put himself in communication with the President of the Commission for the Supervision of the Construction of the Russian War Vessels in America, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty of 1832.

Accept, &c.

ALVEY A. ADEE,
Acting Secretary.

DEPARTMENT OF STATE,
WASHINGTON, August 11, 1900.

The Honorable The ATTORNEY GENERAL.

SIR: I have the honor to enclose herewith a copy of a note from the Russian Chargé d'Affaires requesting the Department's assistance to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears from the note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFersen (McPherson?).

I beg to request that, if consistent with your views, you will instruct the proper United States district attorney to put himself in communication with the Presi-

dent of the Commission for the Supervision of the Construction of the Russian War Vessels in America, mentioned in the note, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty.

I have the honor, etc.

ALVEY A. ADEE,
Acting Secretary.

[Enclosure:]
From Russian Chargé, No. 245, August 6, 1900.

No. 103. DEPARTMENT OF STATE,
WASHINGTON, August 15, 1900.

MR. GRÉGOIRE DE WOLLANT,
etc., etc., etc.

SIR: Referring to your note of the 6th instant, relative to the case of Alexander Lvoff, Assistant Surgeon of the Russian cruiser *Variag*, who, it appears, was arrested as a deserter by the authorities at Philadelphia, and was released by order of Judge McPherson, and to this Department's reply of August 11th, advising you of the reference of the matter to the Attorney General, I have the honor to inform you that I am in receipt of a letter from that official, who states that he has directed the United States Attorney for the Eastern District of Pennsylvania to render all proper advice and assistance to the Russian authorities in aid of the enforcement of the stipulations of the treaty of 1832 upon the subject of the arrest and detention of deserters from ships of war and merchant vessels of each country in the country of the other.

The Attorney General calls attention to the fact that the correspondence does not give the name or address of the President of the Commission for the Supervision of the Construction of Russian War Vessels in America, and he asks that his name be furnished in order that the United States Attorney may be fully informed.

Accept, etc.

ALVEY A. ADEE,
Acting Secretary.

No. 105. DEPARTMENT OF STATE,
WASHINGTON, August 22, 1900.

M. DE WOLLANT, etc., etc., etc.

SIR: Referring to your note of the 6th instant, and to those of this Department of August 11th and 15th, relating to the arrest at Philadelphia as a deserter and the subsequent release of Alexander Lvoff, late Assistant Surgeon of the Russian cruiser *Variag*, I have the honor to enclose a copy of the opinion of the United States District Court granting an order of discharge to the prisoner. In furnishing this copy to me the Attorney General adds that it appears that an appeal on behalf of the Russian authorities has been taken from this judgment to the Circuit Court of Appeals, and that said Lvoff has been held in bail to await the final determination of the proceeding on appeal.

The Attorney General repeats the request communicated to you in my note of the 15th instant for the name and address of the President of the Commission of the Construction of War Vessels in America, in order that the United States Attorney may place himself in communication with that gentlemen and render him all proper advice and assistance in his power.

Accept, etc.,

ALVEY A. ADEE,
Acting Secretary.

[Enclosure:]

Opinion of the United States District Court as above.

(Translation.)

RUSSIAN EMBASSY,
23 November,—6 December, 1900.

MR. SECRETARY OF STATE:

The Russian Minister of the Navy has just informed me that 224 sailors of the Russian Imperial fleet, accompanied by three officers, one doctor, and a commissary, embarked at London on the Amerian Line steamer *Rhineland,* for Philadelphia, where they should arrive about the 16th of December instant.

In view of the fact that these sailors are in the present service of the Russian Government, and 211 of them have been sent to complete the crew of the Russian cruiser *Variag,* and the other 13 are under orders for the *Retvizan,* which is being built by the Cramps, of Philadelphia, I have the honor to request Your Excellency to have the extreme kindness to notify the Treasury Department of the approaching arrival of these sailors, and to request that they may be allowed to land, and that restitution may be made to the superior officer of the tax imposed on emigrants and paid at the time of their embarkation.

Accept, Mr. Secretary of State, etc.,

COUNT CASSINI.

His Excellency,
JOHN HAY,
Secretary of State.

No. 122. DEPARTMENT OF STATE.
WASHINGTON, December 15, 1900.

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 6th instant,* relative to the landing at Philadelphia of certain officers and men for the Russian war vessels *Variag* and *Revizan.*

---

* For this note see insertion, *infra,* p. 13.

Your note was at once referred to the Secretary of the Treasury, who replies as follows:

"The Commissioner of Immigration at Philadelphia has been directed to facilitate the landing of the seamen and officers referred to, and the Collector of Customs will refrain from collecting the per capita tax from the steamship company. The said company should be called upon to refund the amount paid to their Liverpool representative, in advance, for the head tax."

Accept, &c.

JOHN HAY.

(Translation.)

NEW YORK, December 12/25, 1900.

MR. SECRETARY OF STATE: The Imperial Ministry of the Russian Navy has just advised me that 213 seamen of the Imperial Fleet, accompanied by two officers, a monk, and a cook, have embarked at Liverpool on the ship *Belgenland,* bound for the port of Philadelphia, where they are expected to arrive on the 16/29th instant.

In view of the fact that these seamen are sent hither to complete the crew of the Imperial cruiser *Variag,* I hereby pray Your Excellency to inform the Treasury Department of their arrival, so that they may land immediately upon the arrival of the vessel at Philadelphia.

I also beg Your Excellency to have the extreme kindness to allow the free entry of the boxes that are to arrive with the men and contain their personal effects and some articles shipped by the Ministry of the Navy, all for the cruiser *Variag.*

Lastly, I be Your Excellency to take such steps as may be necessary for the return to the commanding officer of the tax imposed on immigrants, which is paid at the time of the sailing of the ship for the United States.

I embrace this opportunity, etc.,

CT. CASSINI.

No. 125. DEPARTMENT OF STATE,

WASHINGTON, December 28, 1900.

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 25th instant relative to the entry at Philadelphia of the officers, seamen, etc., for the Russian cruiser *Variag*.

In reply, I have the honor to quote for your information the telegram sent on the 27th instant by the Secretary of the Treasury to the Collector of Customs at Philadelphia, and also an extract from Mr. Gage's letter reporting his instructions to the Commissioner of Immigration at the same port:

"Admit to entry free of duty and without examination baggage of two hundred thirteen seamen, two officers, a chaplain, and cook of new cruiser *Variag*, arriving per *Belgenland* on twenty-ninth instant, also articles shipped by Ministry of Russian Navy.

"The Commissioner of Immigration at Philadelphia has been directed to facilitate the landing of the seamen and officers referred to, and the Collector of Customs will refrain from collecting the per capita tax from the steamship company. The said company should be called upon to refund the amount paid to their Liverpool representative in advance for head tax."

Accept, &c.

JOHN HAY.

Office Supreme Court U.S.
FILED
OCT 23 1901
JAMES H. McKENNEY,
Clerk.

TREATY WITH RUSSIA, 1832.

U. S. STATUTES AT LARGE, VOL. VIII, p. 444.

ART. VIII.

"The Consuls, Vice Consuls, and Commercial "Agents shall have the right, as such, to sit as judges "and arbitrators in such differences as may arise be- "tween the captains and crews of the vessels belonging "to the nation whose interests are committed to their "charge, without the interference of the local authori- "ties, unless the conduct of the crews or of the captain "should disturb the order of the tranquility of the "country, or the said Consuls, Vice-Consuls, or Com- "mercial Agents should require their assistance to "cause their decisions to be carried into effect or sup- "ported. It is, however, understood that this species "of judgment or arbitration shall not deprive the con- "tending parties of the right they have to resort, on "their return, to the judicial authority of their coun- "try."

ART. IX.

"The said Consuls, Vice-Consuls, and Commercial "Agents are authorized to require the assistance of the "local authorities for the search, arrest, detention and "imprisonment of the deserters from the ships of war "and merchant vessels of their country. For this pur- "pose they shall apply to the competent tribunals, "judges and officers, and shall in writing demand said "deserters, proving, by the exhibition of the registers "of the vessels, the rolls of the crews, or by any other "official documents, that such individuals formed part "of the crews; and this reclamation being thus sub- "stantiated, the surrender shall not be refused.

"Such deserters, when arrested, shall be placed at "the disposal of the said Consuls, Vice-Consuls or Com- "mercial Agents, and may be confined in the public

"prisons, at the request and cost of those who shall "claim them, in order to be detained until the time "when they shall be restored to the vessels to which "they belong, or sent back to their own country by a "vessel of the same nation or any other vessel whatso-"ever. But if not sent back within four months from "the day of their arrest, they shall be set at liberty, "and shall not be again arrested for the same cause."

No. 303.

Brf. of Fuller for Petitioner

Filed Nov. 14, 1901.

Office Supreme Court U.S.
FILED
NOV 14 1901
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

No. 303.

WILLIAM R. TUCKER, Vice-Consul of Russia, Petitioner,

vs.

THE UNITED STATES ex rel. LEO ALEXANDROFF.

ON WRIT OF CERTIORARI

Argument for Petitioner.

PAUL FULLER,
Of Counsel for Petitioner.

McGILL & WALLACE, Law Printers.

IN THE

Supreme Court of the United States.

WILLIAM R. TUCKER, Vice-Consul of Russia, Petitioner,

vs.

THE UNITED STATES *ex rel.* LEO ALEXANDROFF.

No. 303.
On Writ of Certiorari.

ARGUMENT FOR PETITIONER.

The questions to be determined by the Court in this case involve the construction of the Treaty stipulations between Russia and the United States, as well as the application of the rules of comity prevailing between civilized nations concerning the immunity of ships of war in a foreign port.

The petitioner, the Vice-Consul of Russia at Philadelphia, claims that both the rules of comity and the stipulations of the Treaty of 1832 have been ignored, to the grave detriment of the discipline of an Imperial Russian cruiser. A member of the crew of the Russian ship of war, the *Variag*, deserted at the port of Philadelphia. By the assistance of a United States Commissioner he was retaken, and in a proceeding admittedly in accordance with the provisions of the Treaty he was committed to the custody of the keeper of the prison, subject

to the order of the Vice Consul, or of the captain of the war vessel to which he was attached. From this custody he was taken under a writ of habeas corpus, issued by the United States District Court at Philadelphia, and his discharge ordered. This decision was affirmed by the Circuit Court of Appeals, and is brought here for review by writ of certiorari.

I.

The Comity of Nations leaves a foreign commander the exclusive control of his force.

The only requisite to this full control of a naval or military contingent of a foreign nation on our soil, is that it shall not have landed or shall not continue on our soil intrusively or without license or permission of the Government.

Whether it is on our soil with or without permission is a political question, to be determined solely by the sovereign power of the State.

In the present case it has not been shown that the sovereign power has in any way questioned the propriety of the detail of officers and men from the Russian Navy remaining on American soil.

The contrary is shown by the permission to land, by the interposition of the Executive Department through the United States Attorney at Philadelphia, and by the official correspondence of the State and Treasury Departments.

The extent of the immunity is not open to question.

It has been laid down in unmistakable terms by this Court in *The Exchange, 7 Cr., 116.*

It involves a waiver of all jurisdiction over the foreign force and the right in its commander "to use that discipline, and to inflict those punishments which the government of his army may require."

The rule is to be applied, with even more liberality, to vessels of war, whose movements are more likely to call them, innocently, into foreign jurisdictions, and whose discipline and safety are made the more precarious by any relaxation of the commander's authority.

It was a violation of that comity to interfere with the custody of Alexandroff, whether such custody was awarded to the commander by a United States Commissioner, or claimed directly by the commander, without such peaceable and orderly intervention. Even if a conflict had resulted from an attempt to obtain such custody, the Treaty of 1832 made the consular officers the sole judges of the controversy.

II.

The Treaty of 1832 made it the duty of the authorities to aid in restoring the deserter to his commander. It did not give our Courts jurisdiction to take the deserter from his custody.

Supplementing the privileges accorded a foreign commander by the Comity of Nations, the Treaty of 1832 with Russia provided a method by which Russian consular representatives might require the assistance of local

authorities in preserving the integrity of the complement of Russian ships of war. (Art. IX., Treaty of 1832.) There is manifestly no purpose in this treaty provision of conferring jurisdiction upon the courts of the United States to determine controversies between commanders and their seamen, for Article VIII of the same Treaty makes the consular officers judges in all differences between captain and crew without interference from the local authorities. The clear and only purpose is to define the conditions upon which the consuls may invoke the aid of the authorities for the arrest and detention of deserters. It is an *ex parte* proceeding, and for that reason the requisites for its inauguration are very specifically pointed out. Upon proof "by the exhibition of the re-"gisters of the vessels, the rolls of the crew, or by any "other official documents, that such individuals formed "part of the crews, * * * the surrender shall not be refused."

The record in this case shows "that the proceedings "before the Commissioner were formally regular, and that "the testimony taken upon the hearing of the writ of "habeas corpus disclosed no dispute of fact." (P. 31.)

The only inquiry pertinent on the writ of habeas corpus and the return showing this relators' commitment as a deserter, was as to the jurisdiction and authority of the Commissioner to grant the commitment.

This was dependent upon whether he had before him the proof required by the Treaty.

No investigation was made as to that. A new investigation was had as to the condition of the vessel, its ownership, the degree of organization of its crew, &c., &c.

The status of the relator was treated as *res nova* before the Court, and because no register of a vessel or roll of a crew was there produced the Court rejudged the case, and reaching a conclusion different from that of the Commissioner, ordered the discharge of the deserter.

This was totally at variance with the office of a writ of habeas corpus, which can not be made to take the place of a writ of error. It was at variance with the treaty which gave the Russian Consul a right to the custody of the deserter, on satisfying the Commissioner as provided by the Treaty, and which in case of differences between captain and crew made the consular officer the judge between them.

III.

The Grounds of the Decisions below Stated and Considered.

The reasons assigned by the Courts below for denying to the Russian Government the comity for which we contend, or the relief provided by the Treaty, may now be considered.

Briefly stated, they are as follows:

(1) The exercise of comity can not be invoked in view of the Treaty, which operates a change in the law, and embodies the only obligations of the United States to Russia.

(2) The Treaty deals with completed vessels, and the *Variag* was not completed; with Russian vessels, and the *Variag* was not yet a Russian vessel.

(3) The Treaty applies to deserters from vessels, and the relator was never on board the *Variag*.

(4) The Treaty contemplates desertion from a crew, and the crew of the *Variag* was not organized; the men assigned to that service had not yet entered upon it.

(5) The evidence prescribed by the Treaty was not produced before the Court.

(6) Even the comity invoked was insufficient to authorize the detention of the relator, for that comity at most exempted foreign vessels and their contingent from the assertion of jurisdiction by local courts, whereas, in the present case, the exercise of that jurisdiction had been invoked in behalf of the foreign commander.

(7) The rules of comity are applicable only to organized bodies; the detail of officers and seamen in this case was not yet an organization, nor an "integral component" of the Russian Navy.

(8) The comity invoked does not apply to a foreign force intrusively and unauthorizedly present on our soil, but only to such forces as are on our soil by express permission of the Executive.

(1.)

The treaty with Russia did not abrogate the right of Russia to appeal to the exercise of that comity which was common to all civilized nations.

It is true, as observed by Judge Dallas, that treaties are usually allied with a change of law, but the change is an advance and betterment, not a retrograde movement abolishing the common rules universally adopted to

promote the interchange of good offices between sovereignties.

Treaties are not made to destroy authoritative doctrines, but rather to consecrate by solemn compact new ideas of progress and international amity.

The Treaty right is not confined to the privilege exercised under the comity of nations, to wit, the enforcement of Russian discipline on American soil; it goes beyond that, and makes it "a duty on the part of the Government of the United States to aid" the commander in the capture of a deserter from his force. (P. 43.)

The rule of comity left the commander free to enforce the discipline of the foreign force within our borders, while it did not make it an active duty of the Government to aid in the arrest of members of that force. The Treaty did make a change in that law as it then stood, but it was, as will always be found in the case of treaties, an extension and never a recession of the privileges secured by comity; the change was to impose an active duty on the part of the Government to aid the foreign commander in the enforcement of discipline. In the present case the aid was given, and discipline enforced by the arrest of the deserter, and the order to turn him over to the consul or the commander. Comity was respected and the treaty was enforced. At this stage came the interference of the authorities in disregard of both comity and treaty.

(2), (3), (4).

The Treaty deals with vessels, without reference to

their being completed or unfinished; it deals with crews, whether fully organized or still susceptible of additions to fill their possible complement.

The Treaty prescribes a standard for the determination of what is a vessel and what a crew, to wit: "The exhi- "bition of the register of the vessel, the roll of the crew, "or other official documents." If these things are exhibited they establish the existence of the vessel or of the crew for the purposes of the Treaty, and it is unnecessary to delve into expert evidence as to what remains to be done, either in filling out the complement of seamen which the Government may ultimately choose to employ in her management, or in fitting out the vessel, so as to leave no addition possible to her equipment.

But aside from this, the evidence produced on the investigation, which we insist was unauthorized, amply established that the vessel was afloat, and that the crew had entered upon its service.

Judge Dallas mistakenly says (p. 38), that the vessel "was still on the stocks." He had overlooked the testimony of Mr. Cramp (p. 14) to the effect that the vessel had been launched in the fall of 1899, while the relator left the crew of the ship on the 20th of April, 1900. (Pp. 6 and 9.)

The case of the *Eliza Ladd, 8 Fed. Cases, 491*, holds that when a vessel is launched she is a ship.

That the crew was organized and that the relator had entered upon his service is abundantly established by his own testimony at pages 5 to 9.

That the vessel was a Russian vessel is clearly shown

by the terms of the contract which was offered in evidence on behalf of the relator.

That he was never actually on board of the vessel can not be material; if he was a member of the crew, assigned to duty as such, and performing that duty, it is immaterial whether such duty actually brought him on board the vessel during the sojourn of the crew on American soil. The relator testified that he performed the duties required of him as a member of the crew, from October 1899 to April 1900, "in so far as it was his place as an assistant physician." If the crew was on shore, his attendance as an assistant physician required him to be on shore, it was this duty, as a member of the crew, which he shirked and abandoned. The act is a desertion from the ship to which he was attached.

(5.)

There is no requirement of the Treaty that the evidence which it prescribes as sufficient to invoke the aid of the authorities in arresting a deserter, shall be produced before any court which undertakes to investigate or review the proceedings.

The original records or documents mentioned in the Treaty are of a character that forbid their production at all times in the ordinary method governing in judicial proceedings. They form part of the essential records of vessels, and are to be simply "exhibited" to the local authority whose aid is invoked.

The District Judge found that "the proceedings before "the Commissioner were formally regular, and the testi-

"mony taken in the writ of habeas corpus discloses no "dispute of fact." Any further production of evidence was not required.

(6.)

Exemption from the jurisdiction of our courts has not been denied to any member of the Russian Army or Navy. In making the application for the arrest of the deserter the Vice-Consul invited the exercise of its jurisdiction. This is the position taken by Judge Dallas (p. 41). It has been answered under Point II.

(7.)

The rules of comity, it is insisted, are only applicable to organized bodies, forming an integral part of the naval or military forces of Russia, and the detail of officer and men to which the relator was attached was not such a body.

This point is very fully treated in the dissenting opinion of Judge Bradford at pages 49 and 50 of the Record.

The relator was a member of the Russian Navy; he came here as one of a detail of fifty-three regular sailors and an officer of the Imperial Russian Navy for the express purpose of manning the Russian cruiser *Variag*. (5, 8, and 6.)

It would be difficult to add to this conjunction of facts any element that would strengthen the unavoidable conclusion that the detail of officers and men composed, in the language of Judge Dallas, "when conjointly considered, a constituent unit of the Russian Navy," (P. 42.)

Judge Gray seems to have been convinced of this, for he concedes that the body in question was entitled to receive and enjoy the comity and privileges claimed if organized as part of the military or naval force of Russia "*coming here for the purpose disclosed in the record.*" (P. 44.)

(8.)

The remaining reason given in justification of the interference by the Court with the restoration of the relator to the custody of his commander, is that the body of which he formed a part was not on our soil by Executive permission; that "without permission such intrusion is a hostile act" (p 46); and that as a consequence, the detail of men under Captain Behr were not entitled to invoke the exercise of the comity claimed. (P. 47).

"If the Russian Government had requested this recog-"nition and admission as a distinctive part of its navy, "and that request had been acceded to by the Executive "Department" of our Government, says Judge Dallas, "a "different question would have been presented." (P. 42.) This request and permission are attested not only by the letter of the Secretary of the Treasury, and the suggestion of the United States Attorney, but more fully and completely by the additional correspondence furnished to this Court by the State and Treasury Departments.

They dispose of the last doubt which burdened the judgment of the Circuit Court of Appeals, and call for a reversal of the order discharging the relator.

PAUL FULLER,
Of Counsel for Petitioner.

12th November, 1901.

No. 303.
Reply Brf. of Fuller, Leo Alexandroff for Pet'r

Office Supreme Court U.S.
FILED
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JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

(Oct. Term, 1901. No. 303.)

Filed Nov. 30, 1901.

Wm. R. Tucker, Vice-Consul, etc.,

vs.

The United States *ex Rel* Leo Alexandroff.

Petitioner's Reply to Respondent's "Supplemental Memorandum."

(1.) We have no quarrel with the doctrine laid down in the various cases cited in this supplemental memorandum.

The case of *ex parte* Van Hoben, 4th Dillon, 411, simply asserts the familiar doctrine that the complaint in an extradition cause must recite one of the offenses named in the Treaty; the complaint recited forgery but not the species of forgery nor the character of the document forged in such a way as to bring the charge within the terms of the Treaty. There is no such blemish in the present case.

(2) United States *v.* Wyngall, 5th Hill (N. Y.), as cited goes no farther than to suggest that an issue may be raised upon *habeas corpus* without a separate traverse; granting this, the question still remains as to what the issue was. Our contention that the issue was simply as to what evidence was produced before the Commissioner is untouched and we claim that no evidence bearing on that issue was before the Courts below.

(3) That the Court may hear evidence to determine the jurisdiction of the Commissioner we have never disputed, but claim that this is precisely what was not done in the present case.

(4) We take this opportunity of recalling to the Court the three cases of public notoriety in which armed forces of other nations were allowed to land on United States soil.

(*a*) At the Columbian Celebration in 1893 Marines from every foreign war vessel, except the Spanish, were allowed to land and did land and parade in the public streets of New York under the control of their various commanders.

(*b*) On the occasion of the Dewey Parade, a regiment of Canadian Troops was given permission to come into the United States and join in the Dewey Parade.

This permission was granted as in the present case by the *Secretary of the Treasury.*

(*c*) At the Buffalo Exposition, but recently closed, Mexican Troops were allowed to go through the United States and be present at Buffalo and remain there during the Exposition.

None of these permissions required the assent of Congress.

There is no law which makes the assent of Congress necessary in such cases, nor is there any law making the assent of Congress necessary in the extreme case suggested by Mr. Justice Harlan in the course of the argument, to wit, the admission of a troop of British soldiers and leave for them to cross our country in case of a war with Russia where such a transit might facilitate their operations against a Russian enemy. Such an act on the part of the President in case of war might well be considered a breach of the neutrality to which friendly nations are bound, and might well be considered a *casus belli*, and this would be equally so whether the permission was given by the Executive or by Congress. There are not wanting instances in which the action of

the Executive, quite as much as the action of Congress, can be and has been so considered. But, this circumstance does not affect the question whether the power to admit a foreign force lies primarily with the Executive.

New York, 29th November, 1901.

Respectfully submitted,

PAUL FULLER,
JOHN F. LEWIS,
FREDERIC R. COUDERT, Jr.,
Counsel for Petitioner.

No. 642

Notice &c.

FILED
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JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES. 1

Filed April 22, 1901.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser "VARIAG,"

Appellants,

AGAINST 2

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF,

Appellee.

Please take notice that on Monday, April 22nd, 1901, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, the motion of 3
which the annexed is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Dated, April 16th, 1901.

PAUL FULLER,
JOHN F. LEWIS,
Counsel for Petitioner.

To

Messrs. HARRIS & HASSLER,
Attorneys for Leo Alexandroff; 4
SAMUEL DIXON, Esq.,
Attorney for Cramps' Shipbuilding Company.

SUPREME COURT OF THE UNITED STATES. 1

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser "VARIAG,"

Appellants,

AGAINST 2

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF,

Appellee.

And now comes Captain Vladimir Behr and William R. Tucker, Vice-Consul of Russia at Philadelphia, by Paul Fuller and John F. Lewis, Esquires, their counsel, and move this Honorable Court for a writ of *certiorari* directed to the Honorable the Judges of the United States Circuit Court of Appeals within and for the Third Judicial District, commanding them forthwith to certify and return to this court all of the proceedings by them had in the suit lately before them wherein Robert C. Motherwell, Jr., Keeper of the Philadelphia County Prison and Captain Vladimir Behr, Master of the Russian Cruiser were appellants, and the United States of America, *ex rel.* Leo Alexandroff, was appelle, etc. 3 4

Dated, April 16th, 1901.

PAUL FULLER,
JOHN F. LEWIS,
Counsel for Petitioner.

No. 642

MAY 10 1901

JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

Motion to Advance.

ROBERT C. MOTHERWELL, Jr., Keeper of the Philadelphia County Prison, and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser Variag,

Appellants,

AGAINST

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF,

Appellee.

Notice of Motion.

Filed May 10, 1901.

Please take notice, that on Monday, the 13th day of May, 1901, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, the motion, of which the annexed is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Dated New York, May 6th, 1901.

PAUL FULLER,
JOHN F. LEWIS,
Counsel for Appellant.

To

Messrs. HARRIS & HASSLER,
Counsel for Appellee;

SAMUEL DICKSON, Esq.,
Counsel for the William Cramp & Sons Ship & Engine Building Company.

SUPREME COURT OF THE UNITED STATES.

ROBERT C. MOTHERWELL, Jr., Keeper of the Philadelphia County Prison, and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser Variag,

Appellants,

AGAINST

THE UNITED STATES OF AMERICA, *ex rel.* LEO ALEXANDROFF,

Appellee.

Motion.

And now comes William A. Tucker, Vice Consul of the Empire of Russia at Philadelphia, Pennsylvania, by Paul Fuller and John F. Lewis, his counsel, and moves this Court to advance the above-entitled cause upon the Calendar and to set the same down for argument for a day certain.

This case has been removed to this Court by virtue of a writ of *certiorari* duly issued to the Circuit Court of Appeals for the Third Circuit, directing it to send the record of the proceedings in this cause to this Court for its review and determination.

This proceeding was instituted by Leo Alexandroff by a petition of *habeas corpus*. At the time the petition was verified and the writ issued Alexandroff was a member of the Russian Navy and one of the crew of the Russian Cruiser "Variag." He deserted from the crew, was arrested and restored by a United States commissioner to the control of his Captain.

In addition to the fact that this is a *habeas corpus* proceeding, it involves an examination of the jurisdiction of Consular Courts, a construction of the Treaty between the Empire of Russia and the United States of America, an enunciation of a rule for the guidance of

5 the officials of the United States in their relations with foreign governments and a determination as to whether the rules of comity existing between friendly nations did not and do not require that the Courts of this country should not in any way interfere to release a man from service in a foreign navy.

Dated New York, May 6th, 1901.

PAUL FULLER,
JOHN F. LEWIS,
Counsel for Appellant.

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Office Supreme Court
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JAMES H. McKENNEY,
Clerk

TREATY WITH RUSSIA, 1832.

U. S. STATUTES AT LARGE. VOL. VIII, p. 444.

ART. VIII.

"The Consuls, Vice Consuls, and Commercial "Agents shall have the right, as such, to sit as judges "and arbitrators in such differences as may arise be- "tween the captains and crews of the vessels belonging "to the nation whose interests are committed to their "charge, without the interference of the local authori- "ties, unless the conduct of the crews or of the captain "should disturb the order of the tranquility of the "country, or the said Consuls, Vice-Consuls, or Com- "mercial Agents should require their assistance to "cause their decisions to be carried into effect or sup- "ported. It is, however, understood that this species "of judgment or arbitration shall not deprive the con- "tending parties of the right they have to resort, on "their return, to the judicial authority of their coun- "try."

ART. IX.

"The said Consuls, Vice-Consuls, and Commercial "Agents are authorized to require the assistance of the "local authorities for the search, arrest, detention and "imprisonment of the deserters from the ships of war "and merchant vessels of their country. For this pur- "pose they shall apply to the competent tribunals, "judges and officers, and shall in writing demand said "deserters, proving, by the exhibition of the registers "of the vessels, the rolls of the crews, or by any other "official documents, that such individuals formed part "of the crews; and this reclamation being thus sub- "stantiated, the surrender shall not be refused.

"Such deserters, when arrested, shall be placed at "the disposal of the said Consuls, Vice-Consuls or Com- "mercial Agents, and may be confined in the public

" prisons, at the request and cost of those who shall
" claim them, in order to be detained until the time
" when they shall be restored to the vessels to which
" they belong, or sent back to their own country by a
" vessel of the same nation or any other vessel whatso-
" ever. But if not sent back within four months from
" the day of their arrest, they shall be set at liberty,
" and shall not be again arrested for the same cause."





SUPREME COURT OF THE UNITED STATES.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser "VARIAG,"

Appellants,

v.

THE UNITED STATES OF AMERICA, *ex. rel.* LEO ALEXANDROFF.

Appellee.

ANSWER ON BEHALF OF LEO ALEXANDROFF, APPELLEE, TO THE PETITION OF WILLIAM R. TUCKER, FOR CERTIORARI.

Isaac Hassler, of the City of Philadephia, State of Pennsylvania, being duly sworn according to law, deposes and says:

I. That the time since notice of the application for certiorari in the above case was served on the counsel of the relator, Leo Alexandroff, was too short to enable counsel to procure the answer of said Alexandroff himself, he being then a considerable distance away from Philadelphia; and therefore deponent, of counsel for said Alexandroff, makes this answer on his behalf.

II. In answer to paragraph I. of the petition, deponent says that Leo Alexandroff is *not* a member of the crew of the Russian cruiser "Variag"; that this is the chief question in the case, and the decision

senting Judge, have agreed that it was not a Russian ship, because it had not been accepted by the Russian Government.

The deponent therefore says that what deponent believes is the chief point in the case, is agreed on by all the Judges of the District Court and Circuit Court of Appeals. That the Russian Government did not present to the District Court the question of the comity and, while there is a dissent in the Circuit Court of Appeals on this question by one Judge, the other two Judges are in the main agreed.

And therefore deponent says that the Writ of Certiorari to the Circuit Court of Appeals in the Third Circuit prayed for in the petition should not issue.

Sworn to and subscribed before me this 20th day of April, 1901.

J. W. A. Cone
Notary Public
Seal
My commission expires March 6/1905

IN THE

Supreme Court of the United States.

October Term, 1901.

No. 303.

WILLIAM R. TUCKER, VICE-COUNSUL OF RUSSIA,
Petitioner,

v.

THE UNITED STATES, *Ex Rel.* LEO ALEXANDROFF.

Brief for Respondent.

COUNTER-STATEMENT OF FACTS.

The statement of facts in the petitioner's brief, gives a very one-sided view of the case. The chief vice of the statement is that it assumes that there was a crew, which is the principal question in the case. It is true, that in the testimony here and there the word "crew" is used, but only as a convenient term to collectively describe the men sent over by the Russian Government. That this is the case may be seen from the statement of counsel for the relator below (folio 17, record) where counsel for the relator stated: "This man came here with a company of men, but we do not state that he came here as a part of the crew of the 'Variag,'" the purpose of this statement being to admit that he came here with a number of other men, but to deny that there was any organization of them whatever as a crew or in any other way.

For a fair and succinct statement, the Court is referred to the findings of the learned District Judge (p. 31, Record), which are equivalent to the findings of a jury. But a few additional facts are called to the Court's attention.

At the time Alexandroff came to Philadelphia, the "Variag" was an unfinished, inchoate thing on the stocks, which would, in the eye of the law, be probably not considered a ship at all. Since that time, up to the time of the alleged desertion, the Russian government had not done anything to in any way indicate any further control over the ship than it had when the party of men arrived in Philadelphia. No change whatever had been made in the status of the ship. It remained in the builder's hands. Many men were, at the time of the desertion, still working on the ship (p. 10, Record). The only trial trip was under the direction of the superintending engineer of the Cramp Company (p. 11, Record). The Russian government had not yet expressed its satisfaction with the ship (p. 10, Record); or accepted it, and it might still be rejected (p. 12, Record, and see Contract, p. 17). The Russian flag had never been raised on the ship, nor had the ship ever been commissioned as a ship of the Russian navy, nor had the Russian government or a Russian crew ever had actual custody or possession of the ship. Nor had there been any actual indentification of Alexandroff with the ship as a member of its crew.

The fact is significant that the Russian captain was in court (p. 16, Record), but was not called to controvert respondent's case. No claim was made that the ship had been commissioned, nor did the captain or anybody else produce any official documents or papers attesting the ship or the captain's commission. It is submitted, that a fair interpretation of all the facts is, that **there was merely an inchoate intention upon the part of the Russian government that when and if the ship should be accepted, then Alexandroff should become a member of the crew of the ship.**

An important fact upon the question of the jurisdiction of the United States Courts is that the Russian government,

through Vladimir Behr, duly entered its appearance in the District Court and in the Circuit Court of Appeals and took part in the case, and has, through its Vice-Consul, duly made its appearance in the Supreme Court, as the petitioner for *certiorari*.

The particular clauses of the contract betweeen the Cramp Company and the Russian government dwelt on in petitioner's brief give a manifestly unfair view of the instrument. The discussion of its provisions and effect is made below.

It is respectfully suggested, that the "brief for petitioner" does not present the various points in the case in their natural and logical sequence or order. There are many distinct questions at issue which require specific treatment, and this brief has been arranged with these ends in view.

Argument.

I. The important question in the case is—was the "Variag" at the time of the desertion a Russian ship of war and was the respondent a member of her crew?

a. A reference to Article 9 of the treaty of the United States with Russia of 1832 will show that the United States will assist the Russian government in the imprisonment and recovery "of the *deserters from the ships of war* and merchant vessels of their country." Similarly the Revised Statutes, Section 5280, provide for such arrests of a person who "Has deserted from a *vessel of any such government while in any port* of the United States" on proof, "That the person named belonged at the time of desertion to a *crew* of such *vessel*." It is clear, that the United States by this treaty merely intended to assist *Russian ships to recover their crews, when being in a port of the United States, the crews desert.* This is a protection which almost every civilized nation gives to

every other civilized nation; but it is to be confined strictly within the limits of the purpose. The United States has always been averse and has continually declined to make treaties for the return to other countries of *political offenders*, such as those who flee from *compulsory military* or *naval service*. See Treaty with Russia of 1887. And it is clear that the United States **did not agree with Russia to return deserters from the Russian navy, but only deserters from a vessel in a port of the United States**; that is to say, to prevent merely the hazard of a ship coming into a port of the United States and its seamen deserting.

Between these two things is a very wide distinction. Thus, if a member of the Russian navy should escape to the United States from his country or from a Russian ship not being in a a port of the United States, the United States could not and would not lend its aid to compel the fugitive's return. Or suppose that the Russian Government, *instead of sending this company of men to Philadelphia, had* merely detailed the same men out of the Russian navy and had directed them to remain in *St. Petersburg*, intending and stating that they should become the crew of the "Variag," when it should be completed in the port of Philadelphia, and supposing then, that before the ship had been accepted by the Russian Government, the respondent had fled from St. Petersburg and had come to the United States and had declined to become part of the crew of the "Variag," could it be contended that the man would be a deserter in such case under the treaty? Yet, the only difference between that case and the present one is that in the present case Alexandroff was sent to Philadelphia instead of to St. Petersburg; he no more became a part of the crew of the ship in the one case than in the other; he is simply a member of the Russian navy, who is **intended** by the Russian Government to become a part of the crew of the "Variag,' *when that shall be completed and accepted;* until that time he was merely a member of the *Russian navy*, he was not a member of a *crew of a Russian ship*, because the ship had never passed into the *actual custody* and *control* of the

Russian Government or been commissioned, and because no crew had been ever identified with it or organized upon it. Hence he could not be a deserter from it; he was merely a deserter from the Russian navy in both cases, and **the treaty does not provide for the return of deserters from the Russian navy.**

Without a treaty, there can, under no circumstances, be a return of deserters. Moore on Extradition, Sec. 408. Desertion from the army of another country is not an offense, unless under express conventional obligation. *Id.* It would follow from these principles that the right of the Russian Government is founded *strictly upon this treaty, and if it did not show authority in the plain language of the treaty* for the arrest and return of the respondent, he was entitled to his freedom. See U. S. *v* Rauscher; 119 U. S., 407, holding that all extradition depends upon treaty.

In line with this thought, see Moore on Extradition, Sec. 408, Note, where an opinion of Mr. Baird, Secretary of State, is given to the effect that where there are such treaties as the one in the present case, that does not afford any ground for arresting or punishing persons who induce and aid seamen to desert, because the treaty does not provide for that. Under these circumstances, it is contended that the treaty must be construed according to its *plain language*, and that only a deserter of an *actual Russian ship, a Russian ship in fact* in a port of the *United States is amenable under the treaty;* but that a deserter from the *Russian navy* not constituting any member of a *particular* crew of a *particular* ship is not amenable.

b. What effect has the contract between Russia and the Cramp Company? A great deal is made of this contract and it is argued by petitioner that this should control the question of whether or not this was a Russian ship. That contract shows *not* that the Cramp Company is the "agent" of the Russian Government, as suggested in the Circuit Court of Appeals by the petitioner, but that the Cramp Company are contractors to build and sell a

ship, and that during the building of the ship the Russian Government is to have certain rights for its protection. But there is nothihg which indicates any such relation as principal and agent, and the word is nowhere used. Does an agent buy materials on his own credit? Do agents or vendors "deliver" vessels? Do agents or vendors warrant and take the risk of the article supplied? It is simply a contract to build and to sell a ship with the provisions usual in the case of such a large and valuable object, that the buyer shall have certain rights over the subject matter.

But it is contended that Alexandroff's rights are *not concluded by this contract*, however binding it may be *between the Cramp Company and the Russian Government*, nor is the question a question of what the Russian Government *might* do under this contract so far as taking possession and exercising control of the ship is concerned. The question is, *what was in fact done, at the time of the alleged desertion, by the Russian Government to make of this a Russian ship of war?* In other words, the question is not whether as between the Cramp Company and the Russian Government, under the contract the Russian Government would have the right to claim property in the ship at the time of the alleged desertion, *but whether the ship was as a fact a Russian ship of War, whether the Russian Government had at that time, so taken possession of the ship and made it a part, a commissioned part, of the Russian navy, so as to make it a ship of war* under the Treaty. The Court is asked to note Article VIII, Sec. B. and Sec. E. of the contract which show that the Russian Government may *reject* the ship for various reasons, and that thereupon the payments made on account become repayable. The provision in Article X. that the vessel, whether finished or unfinished, and the materials, shall be the exclusive property of the Russian Ministry will undoubtedly, as between the Cramp Company and the Russian Government, give the Russian Government the property in said material, a kind of equitable title, under certain

conditions. But it cannot be said that this makes the ship a ship of war within the treaty.

Suppose that the contract provided that from the moment the loose materials for building the vessel were gathered, these materials should constitute a Russian ship of war, and suppose that while these materials were lying loosely in the shipbuilders' yard, the respondent deserted. Now, under the authorities, such mere materials do not constitute a ship. (The Eliza Ladd, 8 Fed. Cases 491.) Could it be contended with any reason that, because the contract had provided that these loose materials should constitute a ship, that that would make these loose materials a Russian ship of war within the treaty? Yet, if the contract is to control, this is the *reductio ad absurdum* to which such a proposition can be pressed.

And if the vessel be finished and the property of the Russian Ministry of Marine as against the Cramp Company, it is not a **ship of war** under the treaty until it *actually* has been received into the *Russian custody* as a part of the *Russian navy*. The treaty was not concluded to protect deserters from ships in the *custody of the Cramp Company*, but from *ships of war* of Russia. And it is submitted that the question is not what rights Russia *may have* under the contract with the Cramp Company, or what Russia *may do* under the contract, but whether *those rights have been exercised, and whether those things have been done which will make this ship in fact a ship of war of Russia.* But, if the contract is read further through Article X, and Article XII, it will be seen plainly that this apparent absolute right of property in the Russian government is really only an option, so that it *may* if it *desire*, take possession of the ship. Thus the ship is to be insured for the benefit of the Russian government. But why? "To cover and recoup the sum or sums which said government may have paid," etc. This instead of showing property in the Russian government really shows that the intention is to protect Russia upon its payments. But the whole thing is made plain by the closing provisions of Article XII. that notwithstanding all the provisions of the contract the ship shall, as

between the contractors and the Russian Ministry of Marine, stand and at all times be at the risk of the contractors until the said ship *has been accepted* by the Imperial Russian government, or it has *actually taken possession* thereof. Can any such ship by any possibility be said to be a part of the Russian navy, "*a ship of war*" under the treaty?

It is clear that notwithstanding the provision as to property, it is the contractor's ship in law and in fact until acceptance or actual taking possession by the Russian Government; and that the provision as to the property being in the Russian Ministry of Marine is in effect not intended to take the property out of the Cramp Company, but is merely intended to give the Russion government a *cantrol or option* over the ship as against the Cramp Company, if it should be called upon to exercise it against the Cramp Company.

Article XIII. is to the same effect; the contractors are to "*deliver*" the vessel equipped for sea into the charge of the persons appointed by the Imperial Russian Government to receive it in a certain time. If the ship is already the complete property of the Russian Government, why need it be delivered?

Similarly Articles XV. and XVIII. and XX. also speak of delivery. So article XVIII., Sec. 10, provides for the payment of the final ten per cent. of the purchase price, when the ship has had a successful *trial* trip and has been *turned over* to the Imperial Russian Government.

The last portion of Article XX. still further elucidates the property article, Article X., as it provides that the contractors may not "*withhold possession* from the Imperial Russian authorities of the ship," etc, as hereinbefore provided. This shows that it is a mere *option* upon the part of the Russian Government to assume control of the ship as against the Cramp Company should it wish to do so. But the point made by the respondent is that the Russian Government had *never done so*, and that *nothing had been done* to make this ship a *Russian ship of war* under the treaty; that it never *actually* had been *incorporated into the Russian navy as a*

Russian ship of war, and that at the time of the alleged desertion it was the ship of the Cramp Company, both in law and in fact. In law, because this contract should be construed to give only an *option* to the Russian Government to take possession and to maintain its right of property against the Cramp Company; and in fact, because the ship was always in the *actual custody and control* of the *Cramp Company*. But it is submitted that no matter how this contract is regarded as between the Cramp Company and the Russian Government, that cannot affect the question whether under this treaty it was, at the time of the desertion, a Russian ship of war. The question is one of *status* which *is not determinable by the contract*. It is a *status in fact* and the facts are, that the *ship had not been then*, and might never have become, a Russian ship of war, but was merely a ship which was being constructed under a contract with the Russian Government, and which had not then been "*delivered*" by the contractors *into* the Russian Navy.

But the circumstance that *Russia might reject the ship is*, it is contended, conclusive of the question. The kind of ships which the treaty was intended to protect is ships which are *Russian beyond any question* and *without any conditions* at the time of the desertion and the proceedings on *habeas corpus*. This ship might or might not be accepted by the Russian Government. Suppose it were not accepted, could it be contended that it had *ever* formed a part of the Russian navy, that it had ever been a Russian ship of war? And yet, should the District Court have remanded the appellee to await the requisition of the Russian authorities as a *deserter of the crew of the Russian cruiser "Variag,"* the Russian Government might subsequently, by rejecting this ship, have prevented it from ever becoming a Russian cruiser. Could it *then* be said that this man had ever been a part of the crew of the Russian ship "Variag?" His position then would have been that the Court would have declared him to be a deserter from the Russian ship "Variag," but in fact there would never have been such a Russian ship.

It is contended that this circumstance, that the ship might have been rejected, quite settles the matter, as it was not and might never have been a Russian ship of war, and hence it is not within the treaty. Article I. shows that the contracting parties themselves did not consider the thing under construction a Russian ship of war until it should be a "commissioned ship."

What the Treaty means is an actual Russian ship of war, actually commissioned as a part of the Russian navy, and actually and regularly manned by a Russian crew, and about whose status there can be no question.

c. Petitioner insists that the "Variag" was, under the contract, owned by Russia, and that ownership alone determines national character. It is not easy to understand, to say the least, how it can be said that Russia owns a ship which it may never accept. Certainly there is, at the best, no such unconditional ownership as is discussed in every case in which ownership is claimed to determine national character.

In the first place, by a process of exclusion, it is argued that because the ship could not meet the requirements of the law as to American registry, she must be Russian. This is a *non sequitur*. She may not have either character. A vessel may have no national character, as, for instance, a pirate. U. S. *v.* Pirates, 5 Wheat., 199. She may not have complied with our laws and may not be an American vessel and yet be a vessel of no other country, because she has not complied with the laws of any country. The only case which petitioner cites as authority for the proposition that the ownership of the vessel determines her national character is United States *v.* Jenkins, Fed. Cases, No. 15,473, also reported in 2 Law Rep. 146. If the petitioner had proceeded one page further in the report of the case in the volume of Federal cases cited, he would have hesitated to cite the case, for he would have found that on a final determination of the case *exactly the reverse* of the proposition for which he contends, *was decided* by the Court. The phase of the case which the petitioner cites was not the last phase which the case assumed.

There are two branches of this case, the first of which is reporded in Fed.Cases, No. 15,473, and the second in Fed. Cases' No. 15,473, A, immediately following the former report. The first branch of the case is not well considered, the opinion being merely a charge to the jury.

The trial Judge (BETTS, J.) records, that a decision of a Rhode Island court is opposed to his view. But in any event he lays down no such wide principle as appellant contends for. The question was whether because the ship in the case had not duly complied with the statutes as to license, the statutes covering revolts on board American ships could apply. The Court did not say that ownership determines national character for all cases and in all relations, but merely "within the interpretation of these laws;" *i. e.*, the criminal statutes in question.

The second branch of the case was a motion in arrest of the judgment on the verdict of the jury against the defendants, and the Court *in banc* disapproved the opinion of the trial Judge, and judgment was accordingly arrested on the ground that the ship in question was *not an American ship, notwithstanding the fact of its ownership by Americans*, and the Court cited as its precedent for this action a similar case decided by Judge STORY, in the Circuit Court of Rhode Island, United States *v.* Rodgers, Fed. Cases, No. 16,189, in which it was also held that *American ownership does not make the vessel American* and that the vessel must comply with the statutes as to registration and license in accordance with the law before it can have a status as an American ship. The only case, therefore, cited by the petitioner as authority that the national character is determined by ownership turns out to be a case *holding exactly the reverse.*

Justice JOHNSON'S dictum in U. S. *v.* Pirates (*supra*), relied on by Judge BETTS, is very cautious and is decidedly in favor of the respondent's position that the "Variag" was not a Russian ship of war at the time in question. Ownership was of value to decide questions under the criminal statutes, but, says Justice JOHNSON, "The laws that require such documents

(*i. e.*, the registry or documentary papers which establish national character) to be on board a vessel, have relation to financial, commercial or **international objects.**"

Is not the question in this case one having "relation to international objects?" Besides, says Justice JOHNSON, "character is a matter *in pais*." The "*in pais*" of this case is that there was not the slightest circumstance to show the Russian character of this ship, and it might never have assumed a Russian character.

The commission, the flag actually raised, and the circumstances, and not ownership, determine national character. Illustrations are found in cases which consider what are enemy ships in time of war. Thus a vessel only owned in part by an enemy may be hostile property; this demonstrates that property does not determine national character; otherwise, the neutral portion would be exempt. The case of the Industry Spinks, 56, may be taken as typical of these cases, many of which were cited by the petitioner in his brief as appellant in the Circuit of Appeals, but which seem now to be abandoned by him; they show, not that ownership determines national character, as petitioner contended, but that it is decided by something quite different. The Industry was a case of a claim by a Dane for one-fourth of a ship which was captured sailing under the Russian flag (the enemy's flag), the other three-fourths being owned in Russia. The prize court quoting LORD STOWELL's opinion in the "Vrow Elizabeth," 5 C., Rob. 4, said: "I hold the claim to be against the established rules of law, by which it has been decided that a vessel sailing under the **colors and pass** of a nation is to be considered as clothed with the national character of that country." This is held similarly in the "El Telegrafo," Newb., 386, the Court, quoting Wheaton's Internat. Law, 390. That the flag and pass, and not property, are the controlling tests is seen also in the case of "The Stephen Hart," Blatchf., Pr. 413; the "Belvidere," 90 Fed., Rep. 109; the "Amalia," 3 Fed. Rep., 653, which are not cases of enemy property, but cases where jurisdiction over ships sailing under

foreign flags was the question, hold also that the flag is the important test. In the case of the "Benitio Estenger," 176 U. S., 568, Chief Justice FULLER laid down a clear principle as to how the question of enemy character is determined.

He says: "that **political status determines** the question of enemy ownership. And by the law of prize, property engaged in any illegal intercouse with the enemy is declared enemy property, whether belonging to an ally or citizen, as the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences." Here the principle does not seem to be a question of ownership, but whether the prize property is "engaged in any illegal intercourse" with the enemy. It is the illegal traffic, not ownership. The case is important here also as showing the necessity of a *complete* and unconditional transfer of a ship before it can claim international rights growing out of such transfer. See the opinion at page 578.

The use of an enemy's flag is a mark and token of her real ownership. Desty on Shipping and Admiralty, Sec. 416; "The Haile Jackson" Blatchf. Pr., 42; "The William Bagaley," 5th Wall., 410; "The Success," 1 Dods., 132; "Fortuna," *ibid.* 81; "The Success," *ibid.* 132.

The ship's papers are conclusive of the national character of the ship as against the claimants. Desty, 416, citing the United States *v* Bartlett, 2 Ware 16; the "Santissima Trinidad," 7 Wheat., 283. See also for a fine discussion of these points, Hall on International Law (4th ed.), 167, where a public vessel of the State is defined to be a ship of war, government ships not armed as vessels of war, yachts, transports or store-ships, or vessels temporarily employed, whether as transports or otherwise, provided they are used for public purposes only, "that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his State, and that they satisfy other conditions which may be required by that law. The character of a vessel professing to be public is usually evidenced by a flag and pendant which she carries, and, if nec-

essary, by firing a gun." On page 169 of the same book, the author says: "But there are occasions when a vessel changes, or affects to change, her character while within foreign territory. Upon these, other considerations must be brought to bear than those upon which the rules are founded. The vessel is bought, or she is built and fitted out to order, as a piece of mere merchandise; she is only private property owned by the State which has acquired her." In the absence of an actual commission and an unequivocal assumption of the foreign character by the ship "though invested with minor privileges, she is far, if she be a ship of war, from enjoying the full advantages of a public character." It is contended, therefore, that the question whether the ship was a Russian ship of war, is determinable not by any one provision of the contract between the parties, but by the facts of the case, and the facts are, so far as the evidence goes, that, at the time of the desertion, there was no Russian crew in charge of the ship, or a Russian captain in command, that the Russian flag had not been raised, and the ship had not been commissioned, and all these things might never have happened, if the ship had been rejected.

See this rule stated in Hall on International Law, Section 44, pages 170-171. This question ought to be considered as settled, as all the Judges who have considered the case, including even the dissenting Judge, agreed that as far as the treaty is concerded, the "Variag" was not such a ship of war as would come within these provisions.

(*d*) It follows logically that if there was no Russian ship, there was no Russian crew. A similar point which is really so plain as to need no authority was decided by Judge STORY in U. S. *v.* Rogers, Fed. Cases, No. 16,189 (cited above) where he said:

"My opinion, therefore, is that this ship, cannot be deemed an American ship, within the sense of the 3rd section of the Statute of 1835 (C. 40) on which this indictment is founded; and the crew are not the crew of such an American ship or vessel as are contemplated by the act."

II. Can the Russian government cause the arrest of this man as a deserter from the *crew of a particular ship*, under an extradition treaty and then claim him on a different ground, *i. e.*, as a deserter from the Russian Naval Service, which the treaty does not cover? The Supreme Court has answered this question with an emphatic negative in U. S. *v.* Rauscher, 119 U. S., 407. In that case it is held that the man is only to be held for the extraditable offence and cannot be held for any other offence whatever, and that the mere fact that the foreign government has obtained *custody* of the man, by charging the extraditable offence, gives it no right to retain the man for some other offence. Is that not this case? Petitioner finding that he cannot succeed under the treaty, asserts a principle laid down in some cases that on *habeas corpus* the court will dispose of the man to the person entitled to his custody. That may or may not be true always, but it is certainly not true in extradition cases under the principle of *In re* Rauscher. Otherwise, how easy it would be for a foreign government to set up an unwarranted proceeding under some extradition treaty against, say, a much desired political offender who had fled to our asylum and then having caused his arrest and procured his commitment unwarrantedly, as in this and many other cases, claim him on general "custody" grounds, if he invokes *habeas corpus* for his relief. The principle of the above case also holds that a treaty necessarily implies a change in the law (See opinion of DALLAS J., below); and it becomes the definite agreement of the contracting parties, superseding any vague rights which might have been claimed theretofore under general international law. This was plainly recognized by the Russian government in proceeding under the treaty, and its election to proceed should preclude it from asserting any vague right which it may have had before the adoption of the treaty in respect of the immunity of vessels and crews from local jurisdiction.

In re Rauscher is of the greatest importance, and must be maintained in all its strength, or the most dangerous

consequences will ensue as to the rights of political refugees and as to the extent of our sovereign jurisdiction, and as to the limits of our treaty obligations.

III. Were the essential requirements of the treaty fulfilled by the petitioner as to proof?

It is contended that they were not, for the reason that there was no proof "by the exhibition of the registers, the rolls of the crews or by other official documents, that such individuals formed part of the crews."

The extreme importance of these requirements is shown by the fact that it is not only insisted on by the treaty (Art. IX. Treaty of 1832), but also by the section of the Revised Statutes which provides the machinery for carrying into effect the treaty. Revised Statutes 5,280.

It is clear that this provision of the Revised Statutes must be read into, and in connection with the treaty with Russia. Fong *v.* United States, No. 149 U. S., 698.

The petitioner makes much of the fact "that the District Court declared in its opinion that the proceedings before the Commissioner were formally regular." (Petitioner's Brief, p. 6), apparently contending that the District Court meant that the proper evidence had been submitted, whereas, the District Court, as is perfectly clear from the opinion of the District Judge, meant no more than that the forms and technicalities of procedure had been complied with. It is submitted, that this requirement of the treaty and the Revised Statute as to a particular kind of proof is not a form, but a matter of substance of the most essential character, for the District Judge points out (Rec., fol. 34) "that the kind of proof required by the treaty to prove the status has not been offered," and this neither before the Commissioner nor to the Judge himself.

In this connection, some alleged admissions which the petitioner claims were made by cousel for Alexandroff should be considered by the court. It is stated in petitioner's brief

(p. 13) "that there is an admission that the proceedings have been in accordance with the treaty and the Revised Statutes" (p. 16, Rec., and Opinion, p. 31, Rec.) Counsel for Alexandroff made no such admission as that stated to have been made on p. 16, of the Record; they simply did not *object* to Mr. Adler's offer of evidence "to show that the proceedings have been in accordance with the treaty and the Revised Statutes." Counsel did not intend to and did not admit that this evidence did or did not prove that the proceedings had been in accordance with the treaty and the Revised Statutes, but *simply made no objection to the offer* of such evidence, leaving the *effect* of the evidence to the court. Counsel for Alexandroff explicitly denied (fol. 17 Rec.) that Alexandroff came here as a part of the crew of the *Variag*; admitting that Alexandroff was a deserter from the **Russian Naval Service**, it was distinctly *not admitted* that he was a deserter from *the crew of the Variag*. The whole point in the case is, was there such a crew identified with a particular ship that it could be said that the respondent formed part of that crew? The wisdom of this provision in the treaty, requiring the exhibition of the register of the vessel, or roll of the crew, or other official document, to prove that the alleged deserter formed part of the crew, is shown in this case.

Here no such documentary proof was produced, because *none could be produced, there being no register of the vessel or roll of the crew, because there was no Russian vessel and no crew.* This provision is essential to the success of the proceeding before the United States Commissioner; and the circumstance that it does not affirmatively appear in the commitment and in the return to the *habeas corpus* that this essential provision of the treaty was fulfilled, renders the commitment nugatory, for the prisoner would be held without any warrant of law.

That such is the effect of a failure of this character is ruled in Nash's case, 4th Barn. and Ald. 49.

In that case a man was convicted of a certain crime

under an English statute which called for a certain kind of testimony as proof of the crime. On *habeas corpus* the return did not show that such proof had been produced before the committing magistrate, and the Court therefore held that the imprisonment was on its face illegal and without warrant of law, because to convict required a special kind of proof, and as it did not appear on the record that this had been presented, there was no justification for the imprisonment. The present case is precisely the same, but stronger, for here it was proved *dehors* the commitment that there could have been no roll of the crew, because there was neither ship nor crew.

Under the Nash case, the time to produce the documentary proof prescribed by the statute was before the United States Commissioner, but the proof was not produced either before the Commissioner or before the Court below.

IV. Considerable emphasis is laid by counsel for petitioner in their brief on certain technical rules pertaining to *habeas corpus* practice, and on pages 7 and 8 of their brief they cite a number of cases, which, they contend, conclusively determine this case, the most important of which is Ornelas *v.* Ruiz, 161 United States, 502. At the outset, it is to be noted that although in the District Court not a single technical objection of any character was raised by the Russian authorities, they now insist upon every possible minute technical objection which can be wrested out of the case.

a. The authority for issuing a writ of *habeas corpus* in such a case as this is Section 753 Rev. Stat., which provides that the courts have power to issue the writ whenever a person is in custody in violation of a treaty. The purpose of the writ is to "make an inquiry into the cause of restraint of liberty." (Rev. Stat., Sec. 752. See also opinion of Judge DALLAS below, Record, p. 41.) It thus appears that the writ was properly issued and the inquiry properly made.

b. Objection was made that, there having been no for-

mal traverse or reply to the commitment, it stands uncontradicted. It is obvious, therefore, that it is necessary to consider, First, What does the commitment state? Second, Was a formal reply to it necessary?

1st. An examination of the return and the commitment (Record, p. 3, which the Court is earnestly requested to read at length) shows that the keeper of the Philadelphia County Prison, on the return, stated that he held the man in custody by virtue of a commitment, of which he annexed a copy. That commitment shows only two facts of any importance whatever, to wit, that the marshal is commanded "to deliver into the custody of the said keeper the body of Leo Alexandroff, *charged* on oath before Henry R. Edmunds, United States Commissioner, with desertion from the Imperial Russian cruiser 'Variag,'" and that the prisoner was "*apprehended* upon my warrant, issued at the request of the Vice-Consul of Russia, at Philadelphia, upon the complaint of the captain of said cruiser 'Variag,' in accordance with the terms of the treaty between the United States and Russia and with the Act of Congress in such case made and provided." The rest of the commitment consists of a command to the keeper to receive Alexandroff into his custody in the prison and keep him, subject to the order of the Vice-Consul or of the master of the cruiser "Variag," or until he shall be discharged by due course of law.

It thus appears that the prisoner was simply *charged* and *apprehended*. It nowhere appears that there was any examination, such as the revised statute calls for.

The point as to the non-exhibition of the roll or register is made above. It is an unheard of thing, that, where the court provides for an examination, a prisoner should be committed without such examination.

What could the relator have traversed in this commitment? Absolutely nothing,—for we admit that he was charged on oath, by the affidavit of the captain, and that he was apprehended, and that he was placed in the custody of the keeper of the prison.

If the commitment had stated that an exhibition of the register or roll had been made, and an examination had been had, and that the facts necessary under the treaty and the revised statute had been found to be true (which is the requirement of the treaty and the revised statute), the relator would have had something to traverse, and it could then have been urged with some reason that a failure to traverse is equivalent to an admission, although, as will be shown below, a formal traverse was unnecessary. But a fact not alleged cannot be traversed. On the face of it, the commitment is bad and defective in vital particulars.

2d. But the relator, in his petition for the *habeas corpus*, says, under oath, that he was held illegally, and further states that he never deserted the "Variag," and that he never set foot on the "Variag" as a seamen thereof, and the commitment does not deny these facts; furthermore, to make assurance doubly sure, evidence was produced before the District Court to show that the whole proceeding was illegal and unwarranted, and that it could by no possibility be legal or warranted, because there was no ship and no crew, and hence no relation of captain and seaman. That is to say, it was shown that the Commissioner's Court had no jurisdiction either of the person of Leo Alexandroff or the subject matter of the offence with which he was charged, and this, under all the authorities, including Ornelas *v.* Ruiz, and all the authorities cited in the brief for petitioner, is a fact which may be inquired into by the court issuing the *habeas corpus*, for without jurisdiction the proceedings are void.

This evidence was not contradicted, although, as it appears from the record, the alleged captain of the "Variag" was in Court, and could have been called to testify.

Inasmuch as it never appeared that an examination had been had or any evidence offered, it is hard to see why relator is compelled to prove the nature of an examination which, as far as the record goes, never took place. But, on the contrary, the Russian authorities in the lower Court did offer presumably all the evidence at their command to show

what were the proceedings before the Commissioner, and that consisted of the "original affidavit and letter from the imperial Russian Vice-Consul to the Commissioner who committed this defendant, and upon which the warrant was issued," also "affidavit of Captain Behr and letter accompanying same." (See Record, pp. 15–16.)

Although there be no formal traverse or denial of the return to the *habeas corpus* in the manner required by law (3 Rev. Stat. 5 Ed. 889, Sec. 64) evidence to contradict the return is nevertheless admissible if no objection is made at the time that no traverse has been interposed. *People* v. *Sheriff*, 46 Barb. (N. Y.) 619. This objection was raised in the case after the case had been removed on *certiorari* to the Appellate Court, although no objection was made in the lower Court. The Appellate Court said:

"The evidence was admitted without objection as to its character. The objection was levelled at the right of the Judge to go back of the execution. No objection was made that no traverse was interposed and therefore the return was conclusive and could not be contradicted. Was a technical irregularity which could and would have been immediately obviated if objection had been made. The evidence was record evidence and conclusive in its character. The evidence having been offered and considered by the Judge and his decision rendered thereon without objection, it is now too late for the defendant to raise the objection. Order of discharge affirmed."

See *Seary* v. *Seymour*, cited above. This is an important case, showing that where these technical objections as to raising the issue on the *habeas corpus* are not made in the court in which the hearing took place, it is too late to make them afterwards and the court considers them waived It is further submitted that setting aside all technical objections, the gist of the inquiry is whether there could possibly be any evidence before the commissioner on which to commit. It is contended on behalf of Alexandroff, and shown by all the evidence adduced, as well as by the admitted facts,

that there could not be a Russian ship, and that he could not possibly be a member of the crew.

Under these circumstances, it is not requisite for a Court to inquire whether there was sufficient evidence before the commissioner, since it is apparent and palpable that no evidence could have been produced in the very nature of the case. This question is considered in United States *v.* Fowkes, 49 Fed. Rep., 50, affirmed by the Circuit Court of Appeals in 53 Fed. Rep., 13. There, an indictment had been found against a resident of the Eastern District of Pennsylvania by a Federal Court of Missouri, and the defendant had been committed in Pennsylvania by a commissioner to await removal to Missouri. On *habeas corpus* issued by the District Court in Pennsylvania, the return showed the indictment in Missouri, which the District Attorney contended was sufficient to justify his detention. In answer to this, the prisoner's counsel represented certain facts to the Court to show that it was impossible that the crime should have been committed by the prisoner, alleging that he never had been in Missouri. The Court heard evidence to sustain these points and the relator was discharged, the Court holding, that the question whether the Court should inquire no further than the indictment, was in the Court's discretion.

"There can be no doubt of its authority to make such inquiry. Where there is cause to believe the detention improper, the Court may, and should, inquire further. Under ordinary circumstances, an indictment is treated as sufficient. Here, however, the circumstances are extraordinary. * * * The undisputed testimony before me seems at least to justify belief not only that he did not, but also that he could not, commit the offence charged in Missouri, or, indeed, elsewhere."

The Judge then proceeds to speak of the danger to the individual's liberty to hold otherwise: "Here matters of form and considerations, based on notions of comity between courts, have no proper place in trials on *habeas corpus*. In the case of U. S. *v.* Rogers, 23 Fed. Rep.

658, and *In re* Buell, 3 Dill, 116, the Court went behind the indictment to ascertain whether an offence had been commited within the jurisdiction where it was found, as therein charged, and numerous similar cases might be cited. In *In re Nohr, supra* (73 Ala., 508); Hartman *v.* Aveline 63 Ind., 144; Wilcox *v.* Nolze *supra* (34 Ohio, 520), and Jones *v.* Leonard, *supra* (50 Iowa, 106), the court went behind the governor's hearing and warrant of extradition, and inquired whether there was evidence to show that the crime charged had been committed, where the indictment (on which the warrant issued) was found as averred. The court will not, of course, hear the relator's defense and try the case; it requires simply to be satisfied that there is evidence on which a jury may convict. In the case before me there is no evidence whatever on which a jury should proceed, notwithstanding the fact that the circumstances shown call for its production if any exist."

This case has been frequently approved in many districts. Similar decisions have been made in *In re*, Martin, 5 Blatchf., 303; *ex parte*, Hacker, 73 Fed. Rep., 464; U. S. *v.* Patterson, 29 Fed. Rep., 775 at 778, BRADLEY, J.

The case of *ex parte*, Farley, 40 Fed. Rep., 66, cited in brief for the petitioner, page 8, gives this rule as to what the "jurisdiction" of the committing court means: "Jurisdiction in the court means jurisdiction over the place, the person and the thing or subject matter. That there may be a subject matter there must be an act that is a crime, and this act must be properly and legally presented to the Court. See Syllabus, prepared by the Court in this case." *In re*, Lawler, 40 Fed. Rep., 233, the Court speaks of the conclusiveness of the commitment as to all the facts therein cited, for it had been neither demurred to nor denied "nor in any wise put at issue."

In the present case, the commitment sets up no facts, and it certainly cannot be denied that the facts said to be *charged* in the commitment were in some wise put at issue by the relator below by the allegations he made in his petition, as

well as by the proceedings at the hearing. Where the prisoner had been convicted in the court of the United States on a capital or infamous crime upon information without an indictment, he was discharged upon *habeas corpus* proceedings. *Ex parte*, Wilson, 114 U. S., 417.

It is therefore submitted that:

First.—The commitment did not present any facts that could have been traversed.

Second.—That no *formal* traverse was necessary even if it had presented facts.

Third.—That a substantial traverse was made by the introduction of evidence, which was not contradicted, and by the petition of the relator.

Fourth.—That when it appears, as it does here, that by no possibility could the offence have been committed or the evidence requisite to establish it adduced, the Court will waive all formalities and go to the core of the issue.

V. Had the District Court jurisdiction? The odd contention is made by the petitioner that under Article VIII. of the Treaty of 1832, the Russian Vice-Consul at Philadelphia alone had jurisdiction to determine this matter. There are in the way of the success of this contention several important considerations. It is perfectly obvious that the United States never intended to permit a foreign consul to construe treaties, or to determine such questions as arise in this case. The absurdity of permitting a Russian Vice-Consul to pass upon the rights of the alleged deserter would be at once apparent. His decision would in every instance be in favor of his own country and he might so stretch a treaty as to bind the United States by something to which it had never assented. The kind of questions over which the consul is

to have jurisdiction cannot be other than minor questions in which the United States has no immediate interest.

Wildenhus' case, 120 U. S., 11, contains a discussion of this question in the case of a similar treaty, and it is laid down, "If that (the act) is of a character to awaken public interest, when it becomes known, it is a 'disorder,' the nature of which is to affect the community at large and consequently to invoke the power of the local government where the people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community and to create, in the language of the treaty, a disorder which will 'disturbed tranquillity and public order on shore or in port.'" If, as in this case, a crime committed between the decks of a foreign ship by one member of the crew upon another was such a question as the local Courts had jurisdiction of as against the consul on account of the public clamor (which seems to be the only reason), surely the present case was properly before the District Court, where the men lived on shore, where the alleged desertion took place on shore right in the country, and where the question is, what agreement has the United States made with Russia in the Treaty? The foreign consul might fairly be expected to punish the criminal, and the necessity of local intervention is not clearly seen in such a case as the Wildenhus case, but that the Russian consul would do justice, in a case like the present one, where the interests of his nation are overwhelmingly one way cannot be reasonably expected, and it would be derogatory of the international dignity of the United States, were it to permit the foreign consul to pass upon its rights under a treaty made with his government.

But the question is set at rest by the very provision of the treaty itself, for it distinctly says that the vice-consul shall have jurisdiction without the "Interference of the local authorities, **unless—the said consul, vice-consul or commercial agents should require their assistance** to cause their decision to be carried into effect and supported." This is precisely

such a case. Application was made by the representative of Russia to the local authorities in the person of the United States Commissioner, thereupon the "interference of the local authorities" began, and it could not end until the matter was determined in accordance with the local law or treaty; for the courts of the United States have power to issue writs of *habeas corpus* whenever a person is in custody in violation of a treaty. Rev. Stat., Sec. 753.

VI. Opposing counsel seem to give a great deal of importance to the letters presented to the Supreme Court under the title of "Correspondence with State Department and Treasury Department," to submit which, on April 25, 1901, on motion of Mr. F. R. Coudert, Jr., of counsel for petitioner, leave was granted by your Honorable Court.

It is to be borne in mind that at the hearing in the District Court, there was only one letter introduced in evidence, said letter purporting to come from the Treasury Department, without an adressee, and signed O. L. Spaulding, Acting Secretary U. S. (page 17, Record). No other correspondence was then introduced, nor was it intimated that any other correspondence was had upon the subject. Yet, the correspondence printed in separate pamphlet contains, as regards this letter, the name of the addressee, and also a number of other letters introduced, as was said before, by leave of the Supreme Court. In other words, new evidence is introduced by the petitioner upon a *certiorari* from the Circuit Court of Appeals in reference to a matter originally heard in the District Court. It is contended, that this introduction of evidence at such a late stage of the proceedings is illegal, and, furthermore, it does not lie within the discretion of the Appellate Court to grant leave to introduce new evidence at this time. See 2 Foster's Federal Practice, 3rd ed., page 850, where it is said that no new evidence can be offered upon such an appeal, except such evidence as was offered and excluded in the court below. The case of Seavey *v.* Sey-

mour, 3 Cliff., 439, and cited by Foster, it is submitted, effectually disposes of the question of new evidence. It is said in that case, "Power to re-examine the decree of the District Court is all the power in such a case which is possessed by the Circuit Court; and such re-examination must be made upon the same evidence as that introduced in the District Court, except in cases where competent evidence was offered and excluded which should have been admitted. Errors of the District Court may be corrected; but it was not the intention of Congress in providing for an appeal, to give the party a new trial, unless the same should be ordered by the Appellate Court for some error committed by the District Court."

To allow this correspondence to be offered in evidence now, would be subversive of the most elementary principles of law.

The attention of the court, in this connection, is particularly called to the fact that the leave of Court to submit the correspondence was asked for in the absence of, and without notice to counsel for the respondent, and that it was not until the fifth day of November, 1901, that counsel for the respondent discovered that such a motion was ever made on behalf of the petitioner.

Exterritoriality.

VII. The question of exterritoriality has been raised in this case, and it is claimed that the intended crew of the unfinished cruiser "Variag" was immune from the jurisdiction of the local courts. Great stress has been laid upon the case of the Exchange, 7 Cranch,. 117, without giving due consideration to the obvious distinctions between the facts of that case and the one at issue. And before entering into a discussion of the particular rules laid down by Chief Justice Marshall in the Exchange case, it may be well to note that the Brief for Petitioner confounds exterritoriality with consular jurisdic-

tion under a treaty (see pages 4 and 5 of Brief for Petitioner), and thus make their argument upon entirely mistaken premises. They seem to assume that consular jurisdiction can exist absolutely *dehors* the local jurisdiction. In other words, instead of consular jurisdiction being a matter of courtesy extended, or favor granted, by the local authorities, it is assumed to be an original jurisdiction with which the local courts dare not interfere. The Consul seems to be placed upon a pedestal not to be reached by the local courts. This is certainly an erroneous view. The principles of the cases cited on page 5 of Brief for Petitioner are opposed to the view which counsel evidently intend to demonstrate by them. In the Wildenhus case, 120 U. S., 12, jurisdiction was taken by the local courts. In the Belgenland case, Mr. Justice BRADLEY distinctly lays down the rule, citing numerous decisions, that the local court has jurisdiction even in a case where the subject matter of dispute arises between two foreign vessels on the high seas, and the Court there decides, that when a controversy in admiralty betweeen foreign vessels in the courts of the United States arises under the common law of nations, the court below should take jurisdiction, unless special grounds are shown why it should not do so.

Mr. Justice BRADLEY, in delivering the opinion of the Court, says: "Although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arrising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. See 2 Parsons Ship. and Adm., 226, and cases cited in notes. In the case of "The Jerusalem," 2 Gall., 191, decided by Mr. Justice STORY, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte,

and it did not appear that it was intended that the vessel should come to the United States." 114 U. S. 365-366.

The principles of exterritoriality are born of considerations partly of courtesy and partly of convenience. It is a cession of right inherent in the local State to the foreigner, under certain circumstances, but not an inherent right in the foreigner as against the right of the State, where the dispute arises. To regard exterritoriality otherwise, would be to permit an interference by a foreigner with the rights of sovereignty by the local State, and every State is too jealous of its sovereignty that such permission should ever be thought of without an express convention on the part of the State ceding its right. The authorities on international law and the many decisions in the United States courts would seem to emphasize the fact that first and foremost the local jurisdiction attaches to everything within its territory; and only in exceptional instances does a State relinquish its right to impose its jurisdiction upon property and subjects of another State coming within its territory.

As to the Exchange case, it is to be borne in mind that there was an actual ship, sailing under the flag of a foreign nation in amity with the United States, having a thorough and complete organization on board of her, under the command of a captain duly commissioned by his sovereign and in every particular being a ship of France in a port of the United States. The French government did not put in an appearance in the local courts of justice, but maintained its sovereignty throughout, invoking the aid of the President through the Secretary of State in its behalf. The Attorney-General appeared with the suggestion on behalf of the Executive, thus presenting to the court a question based upon international relations between two friendly powers where the foreigner refused to submit to the jurisdiction of the local court. In other words, the nature of that case was purely diplomatic, the foreign government never for an instant voluntarily waiving any particle of its sovereignty to the local authorities. It is submitted, therefore, that there being in that case an actual

ship with an organized crew, flying her country's flag and refusing to submit to the jurisdiction of the local courts, claiming its right of sovereignty through the diplomatic channels, it cannot be a case in which the local jurisdiction would attach as it would and should in this case, where there was no ship, no organization on board of her, no crew and no flag and was still in the possession of a ship building company, which was at the time of the alleged desertion a citizen of the United States, and particularly, where the foreign government does invoke the jurisdiction of the local court, thus placing itself in the position of a suitor, instead of that of a sovereign.

The decision of Chief Justice MARSHALL in the Exchange case, it is contended, would have been different, if the jurisdiction of the local court had been invoked by the representative of the foreign sovereign, or even if the representative of the foreign sovereign would have entered an appearance in a suit against him. See Mighel *v.* Sultan of Johore, 1 Q. B., 147, where LOPES, L. J., says that "the only way in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ." See also King of Portugal *v.* Russell, 31 L. J. Ch., 34.

The matter is set at rest in the opinion of the Court in the Sanitissimo Trinidad, 7 Wheaton, 283, which was the next case of importance to the Exchange case, bearing upon the question of sovereignty, and which explains the rules laid down in the Exchange case by Chief Justice MARSHALL; and the Court's attention is particularly called to pages 352 *et seq.* Judge MARSHALL seems to have had the above expressed thought in mind when, in the concluding paragraph of his opinion in the Exchange case, he says: "If this opinion be correct, there seems to be a *necessity* for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States."

But the question is further settled by the well established principle that, however much a sovereign is exempt from the jurisdiction of another State, if he "appeals to the courts of a foreign State, or accepts their jurisdiction, he brings with him

no privileges that can displace the practice as applying to other suitors." Hall on International Law, Sec. 49, Note, citing the King of Spain *v.* Hullet; 1 Clark and Finelly, H. of L., 333; the "New Battle," L. R. 10, p. 33; Calvo, Sec. 549.

Another consideration to be urged upon the attention of the Court is that, whatever might be the exemption or immunity of a ship of war while its crew is on board ship, the case assumes an entirely different aspect when the crew mingles with the general populace at a place of stoppage. Even the opinion of the Attorney General cited in the brief for the] petitioner (p. 5,) recognizes this principle. On page 122, vol 7, Attorney General's opinion, it is said: "From all these premises, the consequences are inevitable in regard to the prisoners on board the "Sitka." So long as they remained on board that ship they were in the territory and jurisdiction of her sovereign. There, the neutral has no right to meddle with them. If, indeed. they be landed, then they pass from the jurisdiction of the belligerent to that of the neutral." It is, therefore, suggested that the question is to be decided as to the location of the subject matter in dispute. That principle is borne out by the "Santissima Trinidad" as well as in other cases.

The body of Alexandroff was taken, as admitted in the Record, in New York, where he pursued the vocation of a drug store clerk; he having previously declared his intentions to become a citizen of the United States.

Could the decision in the Exchange case possibly apply to the case at issue? Can it be said that sailors detached from their ship, no matter how, are to be immuned from all jurisdiction of the local courts, or that we are taking jurisdiction against the right of a foreign sovereign, when he himself causes the warrant to be issued? It surely cannot be said that the letter of the Assistant Secretary of the Treasury had such a bearing upon the case as to give the detail of men allowed to land exemption from all legal prosecution. The Exchange does not decide that. In fact, by analyzing the

decision of Chief Justice MARSHALL, we are brought to the conclusion that everything laid down in that opinion, beyond the question of a foreign ship of war in a port of the United States, is mere dictum, for the decision in that case was based upon the facts of the case, and the facts, as has been shown above, were such that no local jurisdiction could possibly attach.

Even if it should be admitted that there is a custom in reference to ships, as Judge GRAY says in his opinion, "by reason of their vagrant character," to hold them immune, while in a port of the United States, from the local jurisdiction, and even assuming that that custom has become a law, there is obviously no such custom in regard to the coming and going of troops. There is no law or custom under which soldiers and sailors of one country enjoy exterritoriality in another country.

Under the authorities, it is submitted, the law is exactly the reverse. In countries like Turkey or China, which concede exterritoriality to foreigners, the question would be of slight importance; but in countries which boast of the supremacy of the law, and in which the principle of territorial soverignity prevails, the case is very different. Besides that, in the case of the Exchange, a man-of-war was held to be exempt from the territorial jurisdiction of another country. This principle has not been held to be applicable to soldiers and sailors. (See in this connection Moore on International Arbitrations, Vol. 5, p. 4925, *et seq.*) It has been shown above, that the present case would not come under the decision of the Exchange unless it be under the third or fourth rule laid down in that case.

That the "Variag" is not a national ship of war has been shown above, and therefore it cannot be immuned on that score, nor can the alleged crew, being on land, have any immunity. In this respect, the court is respectfully referred to Hall on International Law. (4th ed., §55.)

"The immunities of a vessel of war belong to her as a complete instrument, made up of a vessel and crew, and intended to be used by the State for specific purposes; the

elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew, she is merely property; if members of her crew go outside the ship or her tenders or beats they are liable in every respect to the territorial jurisdiction. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his state. Possessing his ship, in which he is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the jurisdiction of the country, and if he does so voluntarily, he may fairly be expected to take the consequences of his act."

VIII. What is the effect of the Assistant Secretary's letter, (p. 17, Record), upon the sovereignity of the United States over the men mentioned in the letter? It is well, that this point be considered with the immediately preceding point of sovereignity. If any claim can be made at all by the Russian authorities on the grounds of sovereignity, it must be by reason of this letter; yet, no matter what violent construction should be put upon that letter, no such waiver of sovereignty as is claimed through it, can be gathered from its four corners.

1st. It should be remembered that the letter is addressed to no one, but is presumed by Judge BRADFORD to have been sent to the Russian Ambassador. Grant this, and the question still remains, how can this letter, coming, as it does, from the Secretary of the Treasury, waive the sovereignty of the United States?

All matters pertaining to diplomatic and international relations must necessarily go through the proper executive department, to wit, the Department of State. That is to say, if exemption from the jurisdiction of the United States were intended to be asked for by the Russian authorities and conveyed through the medium of the letter in question, special

permission would, in that event, be given by the President through the Secretary of State; because the President may act through the proper department in any matter pertaining to the business of that department. The treasury department has never been regarded as the proper department for the purpose of conferring such an important thing as exemption and immunity from local jurisdiction.

The cases in which permission has been given to foreign governments to pass their troops through our territory are collected in Wharton's Digest Int. Law, Sec. 13, p. 41, and in every case, the permission was given by the Secretary of State. The permission to go across the country or be stationed there has always been clear and unequivocal. When the President acts through the *proper* department, there is a presumption of his authority if the act be, as Mr. Cushing, Attorney General, said (7 Op. Atty. Gen., 453), "within the lawful jurisdiction of such head of department." Every case cited by Mr. Cushing in that opinion was a case in which the proper department acted, and the authority of the President was therefore presumed. See, similarly, Runkle *v.* United States, 122 U. S., 543.

Now, while the President may act through the treasury department, yet when he does so, it is to be presumed that he is acting with respect to some measure of which the treasury department has jurisdiction, and the possible fair consideration of this letter is that the letter intended merely to waive the head tax and examination required of immigrants, since immigration is a matter which falls within the jurisdiction of the treasury department.

If such important privileges were to be extended as the stationing of several hundred men on our soil as an organized armed body, free from the control of our laws for an indefinite length of time, (as the petitioner must necessarily contend), it is strange, indeed, that such a matter was not conducted by the Secretary of State. The Russian authorities evidently recognize the force of this argument, for in the correspondence submitted by leave of Court it appears that since the

argument in the Circuit Court of Appeals, where this question first became important, the Russian government has addressed correspondence on the subject in question to the State Department, but by what possible construction it can be contended that the United States recognized any organization among these men is hard to see.

It is submitted, therefore, that the letter must be read according to its plain tenor. That the submitted correspondence has no place before this Court, and the Court is referred to the opinions of Judges DALLAS and GRAY in this connection. Reference is also made to Sec. 202 Rev. Stat., stating what are the proper duties of the Secretary of State, and Sec. 248 establishes the duties of the Secretary of Treasury, which are summed up as follows: "And generally (he) shall perform all such services relative to the finances as he shall be directed to perform them."

IX. In reference to the suggestion filed in the Circuit Court of Appeals by the District Attorney, it is to be noted that no such paper appeared in the District Court. Nor is there any precedent for the acceptance of such a suggestion in an appellate court after the parties have submitted to the jurisdiction of the court below and while they continue to submit thereto. The suggestion by the Attorney General in the Exchange case, as it has already been pointed out, was a matter of necessity, since the question could not possibly have been raised without the intervention of the State Department through the District Attorney, as the French Government did not appear in court; but what necessity was there for the suggestion of the Attorney for the United States in the case at issue? Has not the Russian government appeared as a suitor, represented by private counsel, and invoking the jurisdiction of the local Court? It is nothing less than anomalous to have a suitor declare his dignity as a sovereign after he has invoked the jurisdiction of the local Court as an ordinary litigant.

Apart from that, the intrinsic value of the suggestion is

such that it cannot help the petitioner in his difficulty. It discloses no facts but those which appear in the record of the case, and, as was said by Judge DALLAS (page 42 Record), "It is not, in our opinion, well founded in law," and "the legal effect of those facts is for the determination exclusively by the Court;" and Judge GRAY says (Record, p. 46): "The interpretation of the record in this case is the function of the Court and not of the Executive, and the suggestion is in this respect irrelevant."

It is submitted, therefore, that the suggestion is entitled to no weight.

In this connection, the Court is respectfully requested to note the various changes of method adopted in bringing this case to the attention of the various courts. In the District Court, the Russian authorities, admitting the jurisdiction of the local courts by submitting thereto, based their rights upon the treaty and the contract between the Russian Government and the shipbuilders. When that was shown to be untenable, they came into the Circuit Court of Appeals and brought up the question of comity, without giving any evidence of a waiver of sovereignty by the United States, or that there was any organization, or that the captain was entitled to the custody of Alexandroff. Failing there, they now come to the highest court of the land and endeavor to prove their sovereignty by letters written subsequently to the arrest and months after the discharge of the prisoner by the District Court, and in reference to the introduction of which there was no notice given to the other side, and which letters do not even contain the name of Leo Alexandroff, the relator in the court below.

CITIZENSHIP.

X. The Revised Statutes, Section 5280, provide that, if on examination, the facts are found to be true, the deserter shall be delivered up to the foreign consul, unless he is a citizen of the United States. In this case, petitioner has declared

his intention of becoming a citizen of the United States. This provision of the Revised Statutes, which provides the machinery for the operation of such treaties, as the one in hand, must be read into and in connection with the Treaty with Russia. See Fong *v.* U. S., 149, U. S., 698. And it is contended, that if a citizen of the United States will not be delivered up for deportation to the foreign country, neither will a man who has declared his intention of becoming a citizen. It is clearly the intent of the Revised Statutes that the United States shall not lend its aid to a foreign government to deport American citizens. In this connection the Court is respectfully referred to the peculiar state of affairs between Russia and the United States with regard to the American naturalization of Russian subjects. In a number of cases reported in the Official Reports of Foreign Relations of the United States, it appears, that it is a crime under Russian laws for a man to become a citizen of another country, or to attempt to do so without the consent of the Russian authorities. There have been a number of cases in which Russian subjects came to the United States, were regularly naturalized, and while travelling abroad as American citizens in Russia were arrested and punished for breach of the Russian Statutes referred to. The United States has protested again and again against these punishments upon the ground that these men are American citizens, and their crime consists merely in obeying the American law.

See particularly the cases of John Ginzberg in the Reports of the Foreign Relations of the United States for 1895, Part II, page 1081 ; also the case of Anton Yablowsky, *id.*, 1096, *E. Seq.* See also the conclusion of the case of John Ginzberg, reported in the Foreign Relations of the United States for 1897, at page 435, of which Mr. Breckinridge said: "Our citizens of Russian origin, unless with Russia's consent, expose themselves to the gravest hardship by returning to the empire." Mr. Sherman, Secretary of State, in reply to this, said, "The views of the United States and Russia are apparently irreconcilable." See page 440, where Article 325 of

the Russian Penal Code is given as follows: "Whoever absenting himself from the fatherland enters into the service of a foreign power without the permission of the government, or becomes the subject of a foreign power is liable for this violation of his duty and oath of fidelity, to the loss of all his civil rights and perpetual banishment from the Empire; or, if afterwards, he returns voluntarily to Russia, to deportation to Siberia." Even the children of such subjects born here are considered as Russian subjects and amenable to the penalties of this cruel law. While it is true that petitioner has merely declared his intention and is not yet a citizen, still even such persons have some rights. (See Webster on Citizenship.) Particularly would this be the case where the man is within the jurisdiction of the United States. It is clear, that if Russia had this man in her possession and jurisdiction, the United States could not protect him, because of his declaration of intention, especially when the Russian government denies the right of the United States even to protect naturalized citizens. The question is generally determined by the circumstances, which power has *jurisdiction and control over the man.* And as the United States has control over the man in this case, it is respectfully contended that it is proper for the Court, there being this conflict between the Russian law and the American, to determine the issue in favor of the American law and give the petitioner the opportunity of completing the citizenship which he has declared his intention of acquiring. No nation is bound to respect the law of another nation, when those laws conflict with its sovereign will and policy. Story on Conflict of Laws, §25 and 22. At least, if the Court cannot interpret the Revised Statute in the way contended for, the circumstance of the liability of the prisoner to the outrageous penalties of the Russian law for the crime of becoming an American citizen, should be of considerable weight in determining the other question in this cause. And, if there be any doubt as to the status of this ship, it should be resolved in favor of the liberty of the petitioner, and not in favor of a

government whose policy is so diametrically opposed to ours. But it is contended, that the spirit of the revised statutes is in accordance with the construction contended for, and the statute means that the United States will not assist in the extradition of men *over whom it has acquired rights.*

Consideration of Judge Bradford's Dissent.

XI. In conclusion it is proper to consider the opinion of the dissenting Judge, inasmuch as all the other Judges agree in almost every particular. Judge Bradford assumes (Record, p. 48) that Alexandroff came to this country in a body under military discipline. This fact is not proved. The men came on an Atlantic liner and lived on shore, as anybody else would live, although it is true they lived together. Now, the only facts with respect to any military organization are to the effect that the force was to be organized as a crew some time in the future, *i. e.*, when, and if, the Russian Government should accept the ship. There is not the slightest proof that the United States Government expected them to come in as an organized body, or that they were to be organized on shore, or as a matter of fact, that they were organized on shore, or that anybody interested in the matter ever supposed that they would be organized, except some time in the future and then only upon the acceptance of the ship. He lays stress on the fact, (Record p. 50) "that they were here in the employ of their sovereign for strictly national objects and duties." It is to be observed that this circumstance alone would not make them exempt from the local jurisdiction, because foreigners, singly or in groups, may come to this country from another country for national objects and duties who would not be considered beyond the local jurisdiction. They must be an organized military force with full local permission. He assumes, again, that Behr commanded the naval detail on shore. There is no doubt

that he was intended to be the captain of the ship when, and if, that should be accepted, but there is not a particle of evidence that he had the command or custody of these men on shore. Again, Judge BRADFORD assumes too much in his consideration of the letter from the Assistant Secretary of the Treasury, but the discussion of this has been made above. He finds an implication in the letter that the detail, *qua* detail, should in that character remain on our soil and have a right of passage over it, that is, indefinitely ; and thus a mere innocent courtesy in the waiver of small fees is stretched, by implication, to be an agreement that an army of several hundred men should remain on our soil for years, or as long as they please. The learned Judge makes much of the necessity of disregarding formalities (Record, p. 53), ignoring the fact that disregarding these "formalities" would divest the United States of its sovereign jurisdiction, place a foreign army on its soil for an indefinite time, and above local control, and deny the right of asylum to a man forced into naval service by a foreign country. The learned Judge gives the suggestion a most powerful effect, but that subject has been considered above. He then assumes that Captain Behr is entitled to the custody of Alexandroff, and hence should be awarded the custody again on the *habeas corpus*. It is clear, that Alexandroff was not in Behr's custody at the time he was arrested. It is true, the writ named Behr as a respondent, but this only because the Commissioner erroneously named him in the commitment. *Habeas corpus* is only directed to the person having the body. (§ 7, 55 Rev. Stat. ; Seavey *v.* Seymour, 3 Cliff., 439 at 454.) The position of Behr is, therefore, that of a man who is claiming the right as an intervenor such as he probably would have claimed had he not been formally named in the writ. In the latter case there would have been no doubt that his position would have been that of an officer of a foreign navy demanding the extradition of a deserter from a foreign *navy*, and not from a particular *ship*, which extradition is never accorded by the United States.

It is respectfully suggested, that the flaw of the learned Judge's opinion is that he assumes too much without requiring the legal proof from which alone a Judge may draw his conclusions.

Conclusion.

XII. It is, therefore, submitted that Alexandroff was never a member of an organized body to be entitled to the name of "crew;" that he was arrested and held without warrant of law; that neither before nor after his arrest was he in the custody of Captain Behr; that he was not a deserter from a Russian man-of-war; that his desertion did not come within the purview of the treaty of 1832; that there being no Russian ship and no organized crew, there could be no exemption from the local jurisdiction under the general International law; that, if such an exemption would be applicable, the Russian authorities could not avail themselves thereof, after they became suitors in a local Court, and invoked the "interference of the local authorities;" that the letter of the Secretary of the Treasury did not and could not confer immunity from the local law upon the Russian authorities; that Alexandroff is entitled, by reason of his declaration of intention to become a citizen of the United States, to the protection of the laws of the United States; and that under all the circumstances of the case, the judgment of the Court below should be affirmed.

BERNARD HARRIS,
ISAAC HASSLER,
Attorneys for Leo Alexandroff, Respondent.



Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 303.

Sup. Ct. Br. of Alexandroff v Harris for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 18, 1901.

No. 303.

WM. R. TUCKER, VICE-CONSUL, ETC.,

vs.

THE UNITED STATES EX REL. LEO ALEXANDROFF.

SUPPLEMENTAL MEMORANDUM OF AUTHORITIES FOR RESPONDENT.

1st. That the treaty in question is an extradition treaty, see Bouvier's Law Dictionary, "Extradition." After giving the definition of "Extradition," which fully covers this case, it cites instances of extradition treaties, mentioning, among others, treaties for the return of deserting seamen, and specifically mentions the treaty with Russia as one of these. Anderson's Law Dictionary is to the same effect. Sec. 5280, Revised Statutes, which provides for the machinery for carrying the treaty of 1832 into effect, is included in the Revised Statutes, under the title "Extradition."

2d. Upon the question of defects in the commitment in an extradition cause, justifying the discharge on *habeas corpus*, see *Ex parte* Van Hoben, 4th Dillon, 411.

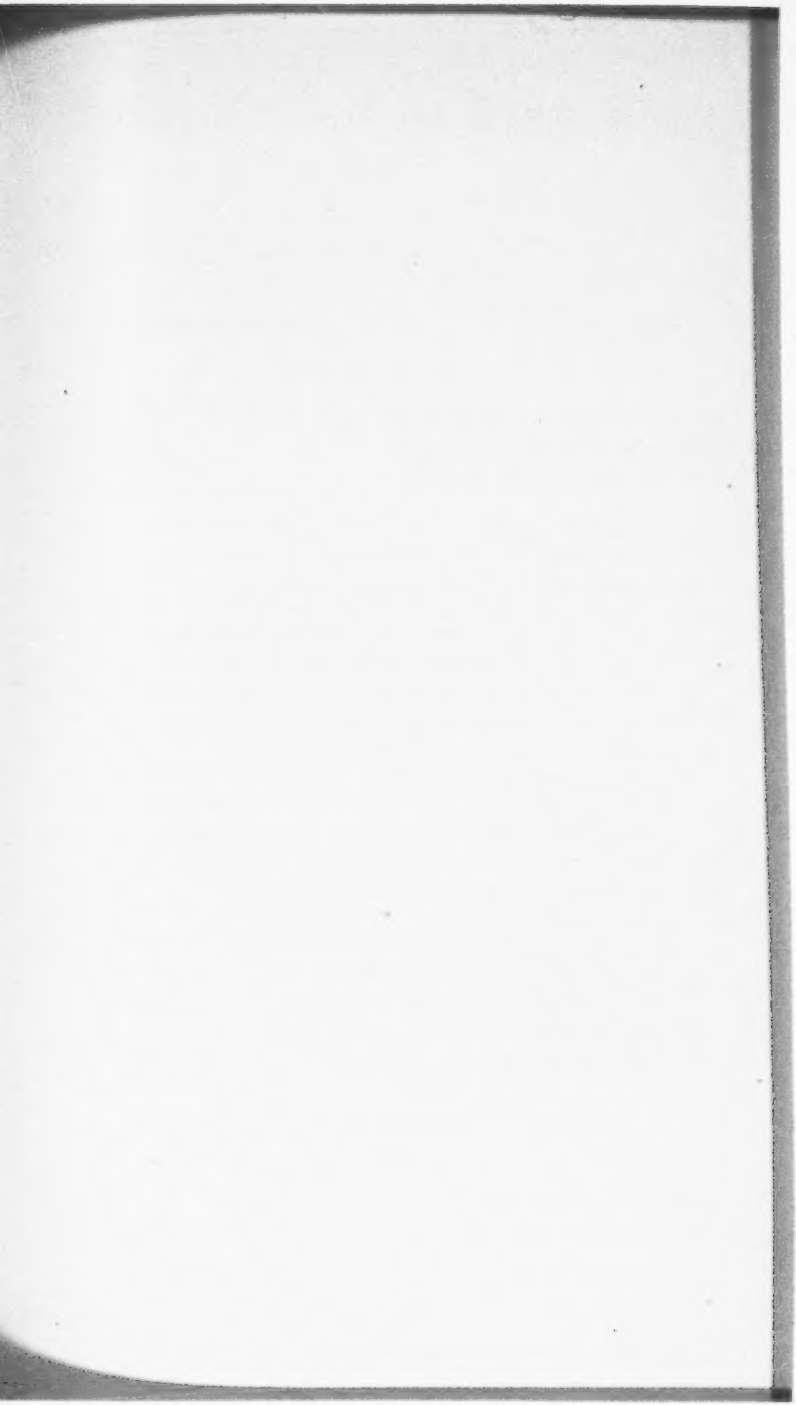
3d. Upon the questions of substantial traverse of the commitment, see United States *vs.* Wyngall, 5th Hill (N. Y.), which holds that the ground of discharge is in the nature of an ordinary replication to the return on *habeas corpus*, and will be so considered by the court.

4th. That the court may hear evidence to determine the jurisdiction of the commissioner, see *in re* Cuddy, 131 U. S., 280. In U. S. *vs.* Jenkins, 2 Wallace, Jr., 521, Federal courts went behind an indictment so as to do justice in the case, which was a *habeas corpus* proceeding.

See also Cosgrove *vs.* Winney, 174 U. S., affirming *In re* Rauscher.

Respectfully submitted.

ISAAC HASSLER,
BERNARD HARRIS,
Counsel for Respondent.





Supreme Court of the United States.

No. 303.—October Term, 1901.

William R. Tucker, Vice-Consul of Russia, Petitioner, *vs.* Leo Alexandroff. | On writ of certiorari to the Circuit Court of Appeals for the Third Circuit.

[January 6, 1902.]

This was a writ of *habeas corpus* issued upon the petition of Alexandroff, to inquire into the cause of his detention by Robert C. Motherwell, keeper of the Philadelphia County Prison, and Captain Vladimir Behr, master of the Russian cruiser Variag.

The petition set forth that the petitioner was illegally detained upon a commissioner's warrant, issued upon the affidavit of Captain Behr, to the effect that he was a duly engaged seaman of the Russian cruiser Variag, whose term of service had not expired; and that he had on or before April 25, 1900, deserted from said vessel, without any intention of returning thereto. Petitioner further averred that on May 24, 1900, he had declared his intention before the proper authorities to become a citizen of the United States, and to renounce his allegiance to the Emperor of Russia, of whom he was then a subject; that he had never deserted the Variag and had "never set his foot on that vessel as a seaman thereof."

In return to the writ the superintendent of the county prison produced the body of Alexandroff, with a copy of the commitment by a United States commissioner, stating than he had been "charged" on oath with desertion from the Variag, and "apprehended" upon a warrant issued by the commissioner at the request of the vice-consul, in accordance with the terms of a treaty between the United States and Russia. There was no statement that an examination had been had before the commissioner, and the warrant did not commit him for examination, but "subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag, or until he shall be discharged by the due course of law." The commitment is reproduced in full in the margin.*

* *Copy of Commitment.*

United States of America, Eastern District of Pennsylvania, } *sct.*

The President of the United States of America to the marshal of said district and to the keeper of the criminal apartment of the Philadelphia county prison at Moyamensing:

These are to command you, the said marshal, forthwith to deliver into the custody of the said keeper the body of Leo Alexandroff, charged on oath before Henry R. Edmunds, United States commissioner, with desertion from the Imperial Russian cruiser Variag, and apprehended upon my warrant issued at the request

Upon a hearing upon the writ, the return thereto and the evidence, the District Court was of opinion, first, that the Variag was not, at the time the petitioner left the service, a Russian ship of war, but simply an unfinished vessel intended for a Russian cruiser; second, that petitioner had not become a member of her crew; that the vessel had no crew in the sense intended by the treaty, inasmuch as the men assigned to that duty had not yet begun that service and might never be called upon to perform it; third, that no such documentary evidence of petitioner's enlistment as a member of the crew, as was required by the treaty, had been offered.

It was accordingly ordered that the prisoner be discharged from custody. (103 Fed. Rep. 198.)

An appeal was taken from this order to the Circuit Court of Appeals, in which court the district attorney entered his appearance and filed a suggestion that, under the facts of the case, the relator should be remanded to the county prison to await the order of Captain Behr, the master of the Variag.

Upon a hearing in the Court of Appeals, the order of the District Court was affirmed. (107 Fed. Rep. 137.) Whereupon William R. Tucker, vice-consul of Russia at Philadelphia, applied for and was granted a writ of certiorari from this court.

Mr. Justice Brown delivered the opinion of the Court.

Upon the facts of this case, the District Court and Court of Appeals were agreed in the opinion that neither under terms of the treaty of 1832 with Russia nor upon principles of international comity could the relator be delivered over to the master of the Variag as a deserter.

In committing him to the Philadelphia County Prison, the commissioner acted in pursuance of R. S. sec. 5280, which provides as follows: "Sec. 5280. On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restora-

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of the vice-consul of Russia at Philadelphia upon the complaint of the captain of said cruiser Variag in accordance with the terms of the treaty between the United States and Russia — with the act of Congress in such case made and provided.

And you, the said keeper of the said prison, are hereby required to receive the said Leo Alexandroff into your custody in the said prison and — the same safely keep him subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag, or until he shall be discharged by the due course of law.

Witness the hand and seal of the said commissioner at Philadelphia this first day of June, A. D. 1900 and in the 124th year of the Independence of the United States.

Copy. Henry R. Edmunds,
[seal.] *United States Commissioner.*

tion of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any Circuit Court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination." The procedure is then set forth.

The facts were, in substance, that Alexandroff entered the Russian naval service as a conscript, in 1896, at the age of seventeen, and was assigned to the duties of an assistant physician. Some time in October, 1899, an officer and a detail of fifty-three men, among whom was Alexandroff, were sent from Russia to Philadelphia to take possession of and man the Variag, then under construction by the firm of Cramp & Sons, in that city. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however launched in October or November, 1899, and at the time Alexandroff deserted was lying in the stream still under construction, not yet having been accepted by the Russian government. Alexandroff left Philadelphia without leave April 20, 1899, went to New York, and there renounced his allegiance to the Emperor of Russia, declaring his intentions of becoming a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed upon a mittimus stating that he had been charged with desertion from the Imperial Russian crusier Variag, upon the complaint of the captain, in accordance with the terms of the treaty between the United States and Russia.

The vice-consul, who prosecutes this appeal on behalf of the Russian government, relies chiefly upon Art. IX of the treaty of December, 1832, which reads as follows (8 Stat. 444): "The said Consuls, Vice-Consuls and Commercial Agents are authorized to require the assistance of the local authorities, for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and, this reclamation being thus substantiated, the surrender shall not be refused." Sections VIII and IX of the treaty, which cover the whole subject of deserting seamen, are reproduced in the margin.*

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*Treaty with Russia, 1832.

Art. VIII.

The Consuls, Vice-Consuls and Commercial Agents shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are com-

While desertion is not a *crime* provided for by any of our numerous extradition treaties with foreign nations, the arrest and return to their ships of deserting seamen is no novelty either in treaties, legislation or general international jurisprudence. The ninth article of the treaty with the government of France, entered into November 14, 1788, before the adoption of the Constitution, contained a stipulation that "the Consuls and Vice-Consuls may cause to be arrested the captains, officers, mariners, sailors and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country," specifying the procedure. (8 Stat. 106, 112.) The same provision was contained in subsequent treaties with France, of June 24, 1822, and February 23, 1853, and it was to carry these and similar treaties into effect that the act of 1829, reproduced in R. S. sec. 5280, was adopted. Similar conventions were entered into with Brazil in 1828, Mexico in 1831, Chili in 1832, Greece in 1837, Bolivia in 1858, Austria in 1870, Belgium in 1880, and at different times with some seventeen or eighteen other powers, and finally by a special treaty with Great Britain, ratified June 3, 1892. In short, it may be said that with the exception of China, the Argentine Republic, and possibly a few others, there is not a maritime nation in the world with which we have not entered into a convention for the arrest and delivery over of deserting

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mitted to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order of the tranquility of the country or the said Consuls, Vice-Consuls or Commercial Agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country.

Art. IX

The said Consuls, Vice-Consuls and Commercial Agents are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by any other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused.

Such deserters, when arrested, shall be placed at the disposal of the said Consuls, Vice-Consuls or Commercial Agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessels to which they belong, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever. But if not sent back within four months from the day of their arrest, they shall be set at liberty, and shall not be again arrested for the same cause.

seamen. The multitude of these conventions is such as to indicate a pressing necessity that masters of vessels should have some recourse to local laws to prevent their being entirely stripped of their crews in foreign ports.

A like provision for the arrest and delivery over of seamen deserting from domestic vessels, adopted by the first Congress in 1790, (1 Stat. 131, 134,) was sustained by this court in *Robertson* v. *Baldwin*, (165 U. S. 275,) and remained upon the statute books for over a hundred years, when it was finally repealed in 1898. (30 Stat. 755, 764.)

We are cited to no case holding that courts have the power, in the absence of treaty stipulations, to order the arrest and return of seamen deserting from foreign ships; and it would appear there was no such power in this country, inasmuch as sec. 5280, under which the commissioner is bound to proceed, limits his jurisdiction to applications by a consul or vice-consul of a foreign government "*having a treaty with the United States*" for that purpose.

In Moore on Extradition, (sec. 408,) it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney General Cushing, (6 Op. 148,) is cited upon that point. There is also another to the same effect. (6 Op. 209.) It is believed that in all the instances which arose between the United States and Great Britain prior to the treaty of 1892 for the reclamation of deserting seamen, both powers have taken the position that in the absence of a treaty there can be no reclamation. Several instances of this kind are cited by Mr. Moore in his treatise.

In the case of the *United States* v. *Rauscher*, (119 U. S. 407,) it was held that, apart from the provisions of treaties upon the subject, there was no well-defined obligation on the part of one country to deliver up fugitives from justice to another, "and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked, and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law."

The only case in our reports even indirectly considering such a case as one of international comity is that of *The Exchange*, (7 Cranch, 116.) This was a libel for possession promoted by the former owners of the Exchange, who alleged that she had been seized under the orders of Napoleon and in violation of the law of nations; that no decree of condemnation had been pronounced against her, but that she remained the property of the libellants.

The district attorney filed a suggestion to the effect that the vessel, whose name had been changed, belonged to the Emperor of the French, and

while actually employed in his service was compelled, by stress of weather, to enter the port of Philadelphia for repairs; that if the vessel had ever belonged to the libellants, their title was divested according to the decrees and laws of France in such case provided. The District Judge dismissed the libel upon the ground that a public armed vessel of a foreign sovereign in amity with our government is not subject to the ordinary judicial tribunals of our country, so far as regards the question of title, by which such sovereign holds the vessel.

On appeal, this court, through Mr. Chief Justice Marshall, held that the decree of the District Court should be affirmed; that the "perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." He divided these cases into three classes:

1. The exemption of the person of the sovereign from arrest or detention in a foreign country.

2. The immunity which all civilized nations allow to foreign ministers.

3. Where the sovereign allows the troops of a foreign prince to pass through his dominions.

In respect to this last class he observed: "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

In this connection he held that there was a distinction between a military force which could only enter a foreign territory by permission of the sovereign, and a public armed vessel, which upon principles of international comity is entitled to enter the ports of any foreign country with which her own country is at peace. He further observed: "If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain under the protection of the government of the place." It was upon this ground that the court held the Exchange exempt from seizure.

This case, however, only holds that the public armed vessels of a foreign nation may, upon principles of comity, enter our harbors with the presumed license of the government, and while there are exempt from the jurisdiction of the local courts; and, by parity of reasoning, that, if foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction.

The case, however, is not authority for the proposition that, if the crews of such vessels, or the members of such military force, actually desert and scatter themselves through the country, their officers are, in the absence of treaty stipulation, authorized to call upon the local authorities for their reclamation. While we have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter *dum fervet opus*, and to that extent this country waives its jurisdiction over the foreign crew or command, yet if a member of that crew actually escapes from the custody of his officers, he commits no crime against the local government, and it is a grave question whether the local courts can be called upon to enforce what is in reality the law of a foreign sovereign. The principle of comity may imply the surrender of jurisdiction over a foreign force within our territory, but it does not necessarily imply the assumption by our courts of a new jurisdiction, invoked by a foreign power, for the arrest of persons who have committed no offense against our laws, and are perhaps seeking to become citizens of our country. Our attention has been called to no such case. But, however this may be, there can be no doubt that the commissioner, in exercising the powers vested in him by R. S. sec. 2580, is limited to the arrest of seamen belonging to a country with whom we have a treaty upon that subject.

Instances are by no means rare where foreign troops have been permitted to enter or cross our territory, although in September, 1790, General Washington, on the advice of Mr. Adams, did refuse to permit British troops to march through the territory of the United States from Detroit to the Mississippi, apparently for the reason that the object of such movement was an attack on New Orleans and the Spanish possessions on the Mississippi. The government might well refuse the passage of foreign troops for the purpose of making an attack upon a power with which we were at peace.

In January, 1862, the Secretary of State gave permission to the British government to land a body of troops at Portland, and to transport them to Canada, the St. Lawrence being closed at that season of the year. The concession was the more significant from the fact that it occurred during our civil war, when our relations with Great Britain were considerably strained, and the object was evidently to strengthen the British garrisons in Canada.

In 1875, permission was granted to the Governor General of Canada to transport through the territory of the United States certain supplies for the use of the Canadian mounted police force.

In 1876, the President permitted Mexico to land in Texas a small body of her troops, supposed to be intended to aid in the defense of Matamoras, with the proviso that the stay be not unnecessarily long, and that the Mexican government should be liable for any injury inflicted by these troops.

By a reciprocity of courtesy, permission was given in 1881 by the Governor General of Canada for the passage of a company of Buffalo militia, armed and equipped, over the Canada Southern Railway, from Buffalo to Detroit. These and other instances are collected by Dr. Wharton in his Digest of International Law, section 13.

Our attention is also called by counsel to the following instances:

At the Columbian celebration in 1893 marines from every foreign war vessel, except the Spanish, were allowed to land and did land and parade in the public streets of New York under the control of their various commanders.

On the occasion of the Dewey parade, a regiment of Canadian troops was given permission to come into the United States and join in the procession.

This permission was granted as in the present case by the Secretary of the Treasury.

At the Buffalo Exposition, but recently closed, Mexican troops were allowed to go through the United States and be present at Buffalo, and remain there during the exposition.

In none of these cases, however, did a question arise with respect to the immunity of foreign troops from the territorial jurisdiction, or the power of their officers over them, or the right of the latter to call upon the local officers for the arrest of deserters. While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters in the absence of positive legislation to that effect.

If the arrest of Alexandroff were wholly without authority of law, we should not feel it our duty to detain him and deliver him up to the custody of Captain Behr, notwithstanding we might be of opinion that he had unlawfully escaped from his custody. If Captain Behr by the escape of Alexandroff lost the right to call upon the local authorities for his arrest and surrender, he acquired no new right in that particular by the fact that

be was illegally arrested and is still in custody. His detention upon the ground of comity could only be justified by the fact that his original arrest was legal, although if his arrest were authorized by law, the fact that such arrest was irregular might be condoned.

But whatever view might be taken of the question of delivering over foreign seamen in the absence of a treaty, we are of opinion that the treaty with Russia, having contained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. (*Ex parte McCardle*, 7 Wall. 506; Endlich on Stats. secs. 397, 400.) As observed by Lord Denham in *Aspdin* v. *Austin*, (5 Ad. & El. N. S. 671, 684,) "where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius*. In several recent cases in this court we have held that, where a statute gives a certain remedy for usurious interest paid, that remedy is exclusive, although in the absence of such a remedy the defense might be made by way of set off or credit upon the original demand. (*Barnet* v. *National Bank*, 98 U. S. 555; *Driesback* v. *National Bank*, 104 U. S. 52; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Haseltine* v. *Central National Bank, ante*, .) See also *King* v. *Sedgley*, (2 Barn. Ad. 65;) *Hare* v. *Horton*, (5 Ibid. 715;) *Stafford* v. *Ingersoll*, (3 Hill, 38.)

We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers, and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. (Taylor on International Law, sec. 383.) As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which

lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (vol. 1, p. 174): "Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."

What, then, are the stipulations to which we must look for the solution of the question involved in this case? They are found in the ninth article of the treaty, which authorizes the arrest and surrender of "deserters from the ships of war and merchant vessels of their country." It is insisted, however, that this article is no proper foundation for the arrest of Alexandroff for three reasons: First, that the Variag was not a Russian ship of war; second, that Alexandroff was not a deserter from such ship; and, third, that his membership of such crew was not proven by the exhibition of registers of vessels, the rolls of the crew, or by other official documennts. The case depends upon the answers to these questions.

1. At the time Alexandroff arrived in Philadelphia, the Variag was still upon the stocks. Whatever be the proper construction of the word under the treaty, she was not then a *ship* in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by State law and enforcible in the State courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. (*The China*, 7 Wall. 53; *Thorp* v. *Hammond*, 12 Wall. 408; *Workman* v. *New York City*, 179 U. S. 552; *The Little Charles*, 1 Brock. 347, 354; *The John G. Stevens*, 170 U. S. 123, 120; *Homer Ramsdell Co.* v. *Comp. Gen. Trans.*, 182 U. S. 406.) She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale. We have had frequent occasion to notice the distinction between a vessel before and after she is launched. In *The Jefferson*, (*People's Ferry Company* v. *Beers*, 20 How. 393,) it was held that the admiralty jurisdiction did not extend to cases where a lien was claimed for work done and materials used in the construc-

tion of a vessel; while the cases holding that for repairs or alterations, supplies or materials, furnished after she is launched, suit may be brought in a court of admiralty, are too numerous for citation.

So sharply is the line drawn between a vessel upon the stocks and a vessel in the water, that the former can never be made liable in admiralty, either *in rem* against herself or *in personam* against her owners, upon contracts or for torts, while if, in taking the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injures another vessel, she is liable to a suit *in rem* for damages. (*The Blenheim*, 2 W. Rob. 421; *The Vianna*, Swab. 405; *The Andalusian*, 2 P. D. 231; *The Glengarry*, 2 P. D. 235; *The George Roper*, 8 P. D. 119; *Baker* v. *Power*, 14 Fed. Rep. 483.)

Inasmuch as the Variag had been launched and was lying in the stream at the time of Alexandroff's desertion, we think she was a ship within the meaning of the treaty.

It requires no argument to show that if she were a ship of any description, she was a ship of war as distinguished from a merchant vessel. Article IX of the treaty embraces deserters from both classes of vessels. She was clearly not a merchant vessel, and as clearly intended to be and was a ship of war, notwithstanding she had not received her armament. The contract with the Cramps under which she was built was entered into by the Russian Ministry of Marine, and provided for the construction by them for the Russian Imperial Government of "a protected cruiser, built, equipped, armed and fitted," &c. The appearance of a modern ship of war, too, is so wholly distinct from that of a merchant vessel, that there could be no possibility of mistaking one for the other.

We are also of opinion that she was a Russian ship of war within the meaning of the treaty. The contract under which she was built not only provided that she was to be built for the Imperial Russian Government, but should be constantly, during the continuance of the contract, inspected by a board of inspection appointed by the Russian Ministry of Marine, who should have full liberty to enter the premises of the contractors for such purpose; and that speed trials should be made by the contractors in the presence of such board of inspection. The tenth article of the contract reads as follows:

"ART. 10. The contractors agree, that the vessel to be built, as aforesaid, whether finished or unfinished, and all steel, iron, timber and other materials as may be required by the contractors, and be intended for the construction of the said ship, and which may be brought upon the premises of the contractors, shall immediately thereupon become, and be, the exclusive property of the Russian Ministry of Marine. The flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian Ministry of Marine

may at any time appoint an officer or officers to take actual possession of the said ship or materials, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid."

Such being her *status* with respect to her title and employment, can it be doubted that, if the contractors had seen fit to institute proceedings under the mechanics' lien law of the State for labor and materials furnished in her construction, or if a materialman had filed a libel in admiralty against her for coal furnished in testing her engines, or if upon her trial trip she had negligently come into collision with another vessel whose owner had instituted a suit against her, the Emperor of Russia might have claimed for her an immunity from local jurisdiction upon the ground that she was the property of a foreign sovereign? In making this defense it would necessarily appear that she was a public vessel; in other words, a ship of war, and upon that ground immune from suit or prosecution in the local courts. In the case of *The Constitution*, (4 P. D. 39,) an historical and venerable frigate of the United States, while returning home from the Paris Exposition with a cargo of American exhibits belonging to private parties, was stranded on the south coast of England and received salvage services from an English tug. It was held by the English Court of Admiralty that no warrant for her arrest could issue, either in respect of ship or cargo. In *The Parlement Belge*, (4 P. D. 129,) a vessel belonging to the King of the Belgians, manned by officers and men commissioned and paid by him, and regularly employed for the purposes of carrying mails, passengers and cargo, was held by the British Court of Admiralty not to be entitled to the privileges of a man-of-war as to extraterritorality, and that she was liable to proceedings *in rem* at the suit of the owner of a vessel injured by her in collision. The decision, however, was reversed by the Court of Appeals, upon the ground that the exercise of such jurisdiction was incompatible with the absolute independence of the sovereign of every superior authority, and that the property as well as the person of the sovereign was exempt from suit. This general question is too well settled to admit of doubt.

It is true there was a provision that the Variag might be rejected either for deficient speed or for excessive draft, and that she should be during her construction at the risk of the contractors, until she had been actually accepted by the Imperial Russian Government, or they had taken actual possession of her. This, however, did not prevent the property passing to the Russian Government as stipulated by article X of the contract, though with a provision for an ultimate rescission. True, the Russian flag had never been hoisted upon the vessel, but that was immaterial, as the government had not finally accepted or taken possession of her.

Mr. Hall, in his treatise upon International Law, discussing foreign ships as non-territorial property of a State, (section 44,) says that the com-

mission under which a commander acts is conclusive of the public character of a vessel, although such character is usually evidenced by the flag and pendant which she carries, and, if necessary, by firing a gun. "When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honor that the vessel is public is often accepted, but the admission of such statements as proof is a matter of courtesy," and "though attestation by a government that a ship belongs to it is final, it does not follow that denial of public character is equally final; assumption and repudiation of responsibility stand upon a different footing." It is true he says that the immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the State for specific purposes; the elements of which she is composed not being capable of separate use for these purposes, and consequently are not exempted from the local jurisdiction. But it is pertinent to notice here that he is speaking of immunities of public vessels from local jurisdiction, and not of the property of a foreign government in such vessels. See also Taylor on International Law, secs. 253, 254, 261. There can be no doubt that the Variag, in the condition in which she was at the time Alexandroff deserted, was a subject of local jurisdiction, and that if any crime had been committed on board of her, such crime would have been cognizable in the local courts, although it would have been otherwise had the Russian government taken possession, put a crew on board of her, and commissioned her for active service. This, however, does not touch the question whether she was not a ship of war within the letter and spirit of the treaty of 1832.

2. Was Alexandroff a deserter from a Russian ship of war within the meaning of the treaty, or was he merely a deserter from the Russian naval service, a fact which of itself would not be sufficient to authorize his arrest under article IX of the treaty? To be a deserter from a particular ship he must have been a member of the crew of such ship, and bound to remain in its service until discharged. It is earnestly insisted that, although he had been detailed to serve thereafter as a member of the crew of the Variag, her crew had never been organized as such. that the detail was merely preliminary to such organization, and that Alexandroff had never set foot upon the vessel. This argument necessarily presupposes that seamen do not become a "crew" until they have actually gone on board the vessel, and entered upon the performance of their duties. We cannot acquiesce in this position. The more reasonable view is that seamen become obligated to merchant vessels from the time they sign the shipping articles, and from that time they may incur the penalties of desertion.

So early as the marine ordinances of Louis XIV—the foundation of all maritime codes—the service of the seaman was treated as beginning from the moment when the contract for such service was entered into. By title three, article III, of this ordinance, "if a seaman leaves a master, without a discharge in writing, *before the voyage is begun*, he may be taken up and imprisoned wherever he can be found," &c. The present Commercial Code of France makes no express provision upon the subject, but by the general mercantile law of Germany, art. 532, "The master can cause any seaman, who, *after having been engaged*, neglects to enter upon or continues to do his duties, to be forcibly compelled to perform the same." By the Dutch code, art. 402, "The master, or his representative, can call in the public force against those *who refuse to come on board*, who absent themselves from the ship without leave, and refuse to perform to the end of the service for which they were engaged."

The rule is the same in England. By section 243 of the Merchants' Shipping Act of 1854, (17 & 18 Vic. chap. 104,) whenever any seaman, *who has been lawfully engaged*, or any apprentice to the sea service, commits any of the following offenses, he shall be liable to be punished summarily, as follows, (that is to say): 2. For *neglecting or refusing*, without reasonable cause, *to join his ship*, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of the ship's sailing from any port, either at the commencement or during the progress of any voyage, . . . he shall be liable to imprisonment," &c. And by section 246, "Whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice *neglects . . . uses to join*, or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve, the master may call upon the local police officers or constables to apprehend him." These provisions have been substantially carried into the new Merchants' Shipping Act. (57 & 58 Vic. chap. 60, sec. 221.)

Congress, however, has so often spoken upon this subject that we think it can hardly be open to doubt. By R. S. sec. 4522, as amended in 1898, (30 Stat. 755,) regulating seamen engaged in interstate commerce, there is a provision that "at the foot of every such contract to ship upon such a vessel . . . there shall be a memorandum in writing of the day and the hour when such seaman who shipped and subscribed shall render himself on board to begin the voyage agreed upon. If any seaman shall neglect *to render himself on board the vessel* for which he has shipped at the time mentioned in such memorandum," and if the master shall make a proper entry in the log book, "then every such seaman shall forfeit for every hour which he shall so neglect to render himself one-half of one day's pay." The rights of the seaman in this connection are protected by section 4527, which declares that "any seaman who has signed an agreement and who is afterwards *discharged before the commencement of the*

voyage or before one month's wages are earned," shall be entitled to compensation. By section 4558, as amended, (30 Stat. 757,) if, after judgment, that such vessel is fit to proceed on her intended voyage, . . . the seamen, or either of them, *shall refuse to proceed on the voyage*, he shall forfeit any wages that may be due him. Section 4596 is largely a reproduction of the section above cited from the Merchants' Shipping Act, and provides that "whenever any seaman who has been lawfully engaged . . . commits any of the following offenses he shall be punishable as follows: Second. For *neglecting or refusing*, without reasonable cause, *to join his vessel* or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of any voyage," he shall forfeit his wages. By section 4599, "whenever, either at the commencement of or during any voyage any seaman or apprentice *neglects or refuses to join*, or deserts from or refuses to proceed to sea in, any vessel in which he is duly engaged to serve," the master may [in accordance with the English practice] apply for the local assistance of police officers or constables for his arrest and detention. It is true this section has been repealed, together with all other provisions authorizing the arrest and surrender to the vessel of seamen of domestic vessels deserting in this country. But throughout all this legislation there is a recognition of the principle that the obligation of the seaman begins with the signing of the shipping articles, and that he is liable to the penalty of a forfeiture of his wages from that moment.

Upon these authorities we are of opinion that, as applied to merchant vessels, the crews are organized and the service of each sailor begins with the signing of the shipping articles, and that the lien of the seaman upon the ship for his wages, and reciprocally the lien of the ship upon the seaman for his services, where such lien still exists, dates from that time. The difficulty of securing a crew would be greatly enhanced if, after signing the articles and perhaps drawing advance pay, seamen were at liberty to desert before rendering themselves on board.

The Variag being a ship of war, there was no signing of shipping articles, as required in the merchant service, since the seamen were enlisted or conscribed to serve where ordered. But there was a practical equivalent for the shipping articles in the detail of Alexandroff to this vessel. He entered the Russian naval service in 1896, and his term of service had not expired. He was, of course, subject to the orders of his officers, and was sent as a member of a force of one officer and fifty-three men ordered to take possession of the Variag as soon as she was completed. From the moment of such assignment and until relieved therefrom, he was as much bound to the service of the Variag, and a member of her crew, as if he had signed shipping articles. We express no opinion as to whether, f the Variag had not been launched when he deserted, he could be

held as a member of her crew, but when she took the water and became a ship she was competent to receive a crew, and a detail to her service took effect. It will scarcely be disputed that, if the Variag had been in commission and this body of men had gone on board the vessel and rendered some slight service as seamen, and had subsequently gone ashore to remain until she was ready for her final departure from Philadelphia, they would be regarded as a component part of her crew; but this differs in form rather than in substance from what actually took place. The men were in Philadelphia in custody of Captain Behr, and ready to go on board at a moment's notice. They were as much subject to his orders as if they had remained on board the Variag; and as much so as if she had been a regularly commissioned vessel of the Russian Navy, which had put into Philadelphia for repairs and sent her crew ashore as the most convenient method of disposing of them while such repairs were being made.

We do not regard it as material that the Variag had not yet been commissioned as a member of the Russian Navy. The mere commissioning of a ship does not make her a ship of war, but merely indicates that she is assigned to active service. A merchant vessel, built for the purpose of trade and commerce, is a merchant vessel, though she may not yet have received her register—a formality only necessary to entitle her to the privileges of an American vessel. To hold that the treaty applies only to commissioned vessels of war is to introduce into it a new element and to rob it of a valuable feature. Under the contract with the builders she was clearly Russian property, and while ownership is not always proof of nationality, since a vessel may be owned in one country and registered in another, where the facts are undisputed, and there was no pretence she was an American vessel, her Russian nationality follows as a matter of course. If she went out of commission and her armament were taken out of her for a temporary purpose, she would nevertheless be a ship of war of the Russian Navy. Being, as we have already held, a *ship*, she must be either a ship of war or merchant vessel, and as she was clearly not a merchant vessel, the only other alternative applies. The treaty should be liberally interpreted in this particular to carry out the intent of the parties, since if a foreign government may not send details of men to take possession of vessels built here, without danger of losing their entire command by desertion, we must either cease building them or foreign governments must send special ships of their own with crews ordered to take possession of them. It is true that possession of the Variag had not yet been delivered, but the title had passed, and the very fact that the Russian Government had detailed a crew to take possession of her indicated that it regarded her as a constituent part of the Russian Navy. It is unnecessary to consider whether, if the Variag had been rejected, her crew would have been *eo instanti* at liberty to leave the Russian service and acquire a citizenship

here. That probably would have involved the other question, whether they could be treated as a military force entering this country with the permission of the Executive and remaining subject to the orders of their officers.

Holding, as we do, that the rights of the parties must be determined by the treaty, the manner in which this body of men entered the country does not seem to be material, so long as it appears that they were detailed as part of the crew of the Variag. If they were not here as a military force, which had landed with the permission of the government, they were lawfully here as individual seamen directed to take possession of the Variag, and the purpose of their coming was of no moment to the authorities. It appears, however—and it is not improper to allude to it here—that, as the Variag approached her completion, the naval agent of the Russian Embassy to the United States addressed a letter to the Secretary of the Treasury, requesting that the necessary orders be given for allowing "admittance to the United States, through the port of New York, without examination, the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partly manning the cruiser," &c. In reply, the Acting Secretary of the Treasury issued instructions to the Commission of Immigration to admit the detail without examination for the purposes named, and to remit the usual head tax of one dollar.

3. The only remaining question is whether there was a compliance with article IX of the treaty, that the vice-consul "shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by any other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused." We have no doubt this provision is obligatory, and that the vice-consul must show either that it was complied with or that a compliance was waived. We are not informed by the record what evidence was laid before the commissioner upon this subject. Alexandroff himself, however, swears that he entered the naval service in 1896 as an assistant physician; that he arrived in the United States October 14, 1899; that he never asked to become a member of the crew, but was simply sent to the United States and lived with the crew of the Russian ship, received his equipment, support and wages; that he left the crew on April 20, 1900, went to New York, declared his intention to become a citizen, and obtained employment. On cross examination he stated that a subject is not required to sign any enlistment or anything of that kind, but is simply sent into the service. After the oral testimony had been introduced, the Russian vice-consul, to further sustain his case, made the following offer:

"Mr. Adler: I also have here the Russian officer who accompanied these fifty-three sailors to this country, together with the other members of the crew, who has with him the passport issued by his government entitled these men to come here. I understand it is admitted by the other side that this defendant did come here as a portion of the crew of this cruiser, and the passport so states. If that is admitted, I presume it is not necessary to offer the passport in evidence. If your honor cares to have it, I will produce this officer with the passport and offer it. It merely shows that this defendant, with fifty-two other members of a company in the Russian Navy, were admitted to free passage here to become members of the crew of the cruiser Variag, and that he came here in pursuance of that passport accompanied by this officer.

"Mr. Hassler: I should object to the officer, not so much on account of what is in the passport, but my friend made a statement which I do not think is exactly accurate, as to what we stated. We stated this man came here with a company of men, but we do not state that he came here as part of the crew of the Variag.

"The Court: He came here as a member of the Russian Navy, ordered here to become one of the crew of the cruiser Variag, and he came for that express purpose.

"Mr. Hassler: We concede that."

There was here a clear waiver of the production of the passport and an admission that Alexandroff came to this country as a member of the Russian Navy, was ordered here to become one of the crew of the Variag, and came for that express purpose. Under such circumstances, it does not lie in the mouth of the relator to insist that no official documents were produced, since the passport and the admission accompanying its offer show that Alexandroff came here as a member of the proposed crew of the Variag, (and we have discussed the case upon that assumption)—the question being whether under those circumstances he ought to be treated as a deserter from a Russian ship of war.

We are of opinion that his case is within the treaty, and the judgments of both courts below are therefore reversed, and the case remanded to the District Court for the Eastern District of Pennsylvania for further proceedings consistent with this opinion.

Mr. Justice PECKHAM concurred in the opinion, but also thought that the men, among whom was the respondent, came into the country with the expressed permission of the Executive as a part of the Russian navy and as members of the crew of the steamship awaiting completion as a man-of-war; and the Russian government was, therefore, upon the principle of comity, entitled to the aid of the government of the United States to accomplish the arrest and detention of a deserter from the ranks of those men it had thus expressly authorized to come in.

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Supreme Court of the United States.

No. 303.—October Term, 1901.

William R. Tucker, Vice-Consul of Russia at Philadelphia, Pennsylvania, Petitioner, *vs.* The United States ex rel. Leo Alexandroff. } On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 6, 1902.]

Mr. Justice Gray, with whom concurred Mr. Chief Justice Fuller and Justices Harlan and White, dissenting:

The Chief Justice, Justices Harlan and White and myself are unable to concur in the opinion and judgment of the court. The case presents such an important question of international law as to make it fit that the grounds of our opinion should be stated. It is necessary to a proper determination of the case that its precise facts should be borne in mind, and they will therefore be here recapitulated.

This is a writ of certiorari, granted by this court on the application of William R. Tucker, the Russian Vice-Consul at Philadelphia, to review a judgment of the United States Circuit Court of Appeals for the Third Circuit on February 25, 1901, (107 Fed. Rep. 437,) affirming a judgment of the District Court for the Eastern District of Pennsylvania on July 12, 1900, (103 Fed. Rep. 198,) discharging on writ of *habeas corpus* Leo Alexandroff, held in custody under a warrant of commitment issued by a United States commissioner to Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, subject to the order of the Russian Vice-Consul at Philadelphia, or of the master of the Russian cruiser Variag, under section 5280 of the Revised Statutes, which is as follows:

"On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any Circuit Court, justice or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United

States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect."

The treaty of the United States with the Emperor of Russia of December 18, 1832, provides, in article 9, as follows:

"The said consuls, vice-consuls and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused. Such deserters, when arrested, shall be placed at the disposal of the said consuls, vice-consuls or commercial agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessels to which they belonged, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever. But if not sent back within four months from the day of their arrest, they shall be set at liberty, and shall not be again arrested for the same cause. However, if the deserter should be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which his case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into effect." 8 Stat. 448.

The warrant of commitment in this case was issued by the commissioner on June 1, 1900, on the application of the Vice-Consul of Russia at Philadelphia, upon the affidavit of Captain Vladimir Behr, stating that he was master of the Russian cruiser Variag, then in the port of Philadelphia, and that Alexandroff was a duly engaged seaman of that vessel, and on or before April 25, 1900, had deserted from her without any intention of returning.

The Variag was built under a contract in writing, dated April 23, 1898, between the William Cramp and Sons Ship and Engine Building Company of Philadelphia, Pennsylvania, and the Russian Ministry of

Marine, by which the Cramp Company agreed to supply for the Imperial Russian Navy a protected cruiser, built, equipped, armed and fitted, (except the ordnance and torpedo outfit,) subject to the approval of a board of inspectors appointed by the Russian Ministry of Marine. That contract contained the following provisions:

"ART. 8. Trials to determine the speed of the vessel shall be made by the contractors, in the presence of the board of inspection, and at the cost of the contractors, who agree to insure the vessel against sea risks and all other risks of every description during the trials, and until such time as the vessel is handed over to the exclusive possession and custody of the Russian Ministry of Marine." And if the mean speed should be less than twenty-one knots per hour, or the actual draught of water in any part of the ship should exceed the contract draught by one foot, it should be optional with the Russian Ministry of Marine to reject the ship.

"ART. 10. The contractors agree that the vessel to be built as aforesaid, whether finished or unfinished, and all steel, iron, timber and other materials as may be required by the contractors, and be intended for the construction of the said ship, and which may be brought upon the premises of the contractors, shall immediately thereupon become and be the exclusive property of the Russian Ministry of Marine. The flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian Ministry of Marine may at any time appoint an officer or officers to take actual possession of the said ship or material, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid."

"ART. 12. The contractors shall insure and keep insured, against all risks usually insured against, the said vessel, its engines and all fittings and materials, at their own cost, but in the name of, and for the benefit of, the Russian Ministry of Marine, in fire insurance companies previously approved by the board of inspection, and in such an amount or amounts as shall be, from time to time, sufficient to cover and recoup to the Imperial Russian Government the sum or sums which said government, for the time being, may have paid, or become bound to pay, to the contractors in respect of such vessel." "Notwithstanding anything herein contained, the ship, together with its engines, machinery and equipment, shall, as between the contractors and the Russian Ministry of Marine, stand, and at all times be, at the risk of the contractors, until the said ship has been accepted by the Imperial Russian Government, or it has taken actual possession thereof."

"ART. 13. The contractors engage, at their own cost and risk, to launch and deliver the vessel safe and uninjured at Philadelphia, Pennsylvania, and equipped for sea, into the charge of the persons appointed by the

Imperial Russian Government to receive it, in not more than twenty months after the arrival of the board of inspectors at Philadelphia."

By article 18, the Russian Ministry of Marine agreed to pay the price in ten equal instalments, withholding ten per cent of each instalment until final payment. The instalments were payable at successive periods, the last two being as follows: "9. Ten per cent when steam has been raised in the boilers and the engines turned over under their own steam. 10. Ten per cent when the ship has had a successful trial trip and has been turned over to the Imperial Russian Government, and simultaneously therewith there shall be paid to the contractors the ten per cent of each of the previous instalments which shall have been withheld as aforesaid."

Alexandroff entered the Russian Navy in 1896, at the age of seventeen, for the term of six years, and was an assistant physician. He was one of fifty-three members of the Russian Navy, sent out in a passenger steamship (not a Russian) by the Russian Government, under command of an officer, for the purpose of becoming part of the crew of the cruiser Variag; and arrived in this country October 14, 1899. The ship was then on the stocks, and was launched in October or November, 1899, and made one trial trip. But in June, 1900, she was still in the custody of the contractors, had not been completed by them, or accepted by the Russian government, and a good many of the contractors' men were still working on her; and only about eighty per cent of her price had been paid. Alexandroff was never on the ship, never signed any paper as a member of her crew, and was never ordered on board of her, either as a seaman or as an assistant physician; but from October, 1899, to April, 1900, lived on shore, with the rest of the men who came with him, had his photograph taken with them, received equipment, support and wages from the Russian Government, and performed the duties required of him as an assistant physician. He left his associates, without leave, at Philadelphia on April 20, 1900, went to New York, and there took up his residence, and on May 24, 1900, made in court a primary declaration of his intention to become a citizen of the United States.

There was introduced in evidence, without objection, a copy of a letter, (the original of which was said to be in the possession of the Russian Ambassador at Washington,) dated "Treasury Department, Office of the Secretary, Washington, D. C., October 4, 1899," signed by the Acting Secretary of the Treasury, and in these terms:

"Sir: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under

construction for the Russian Government at Cramp's ship yard in Philadelphia, Pennsylvania. The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case."

This letter was assumed by the courts below to have been addressed to the Russian Ambassador and in answer to a letter from him. But it appears by copies of documents in the Treasury Department, submitted by counsel for the petitioner by leave of this court, that it was in answer to a letter, dated September 24, 1899, No. 557, from the Naval Attaché of the Imperial Russian Embassy at Washington to the Secretary of the Treasury, requesting that the necessary orders to whom it concerned might be given for "allowing admittance to the United States through the port of New York without examination the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's ship yard, in Philadelphia, Pennsylvania."

That correspondence also included similar letters between the Naval Attaché of the Russian Embassy and the Secretary of the Treasury of June 22 and 23, 1899, concerning "a detail of one officer and twenty nine regular sailors for the purpose of partially manning the cruiser" aforesaid.

Together with that correspondence, the petitioner submitted to this court copies of papers from the Department of State, showing the following:

On December 6, 1900, the Russian Ambassador wrote to the Secretary of State, saying that the Russian Minister of the Navy had just informed him that 224 sailors of the Russian Imperial Navy, accompanied by three officers, one doctor and a commissary, had embarked at London on the Rhineland for Philadelphia, and that "211 of them have been sent to complete the crew of the Russian cruiser Variag, and the other 13 are under orders for the Retvisan, which is being built by the Cramps of Philadelphia," and requesting the Secretary of State "to notify the Treasury Department of the approaching arrival of these sailors, and to request that they may be allowed to land, and that restitution may be made to the superior officer of the tax imposed on emigrants and paid at the time of their embarkation." On December 15, 1900, the Secretary of State answered that the request had been referred to the Secretary of the Treasury, who had replied that the commissioner of immigration at Philadelphia had been directed to facilitate the landing of the seamen and officers referred to, and the collector of customs to refrain from collecting the *per capita* tax from the steamship company; and that said company should be called upon to refund the amount paid to their Liverpool representative in advance for the head tax. On December 25 and 28, 1900, a like correspondence took place between the Russian Ambassador and the Secretary of State concerning "213 seamen of the Imperial fleet, accompanied by two officers, a monk and a cook," embarked at Liverpool for Philadelphia on

the Belgenland, and "sent hither to complete the crew of the Imperial cruiser Varing."

In the Circuit Court of Appeals, on October 1, 1900, the Attorney of the United States for the Eastern District of Pennsylvania, "at the instance of the Executive Department of the Government of the United States," filed by leave of court a suggestion, stating the facts as appearing by the record, and praying that Alexandroff be remanded to the custody of the keeper of the county prison at Philadelphia, to await the order of Captain Vladimir Behr, master of the cruiser Variag.

Such being the facts of the case, we proceed to state the principles by which it appears to us to be governed.

The jurisdiction of every nation within its own territory is absolute and exclusive; by its own consent only can any exception to that jurisdiction exist in favor of a foreign nation; and any authority in its own courts to give effect to such an exception by affirmative action must rest upon express treaty or statute.

In the case of *The Exchange*, decided by this court in 1812, nearly ninety years ago, the point adjudged was that "*The Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country." 7 Cranch, 116, 147. Chief Justice Marshall, in expounding at large the principles upon which the exemption was founded, began by saying: "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." 7 Cranch, 136. He then dealt with the principal exceptions: 1st. The exemption from arrest or detention of a foreign sovereign entering the territory of a nation with the license of its sovereign. 2d. The immunity which all civilized nations allow to foreign ministers. 3d.

The cession of a portion of the territorial jurisdiction by allowing the troops of a foreign prince to pass through the territory.

The opinion of Chief Justice Marshall in the case of *The Exchange* has ever since been recognized as laying down the principles which govern the subject. His very language has been embodied by Wheaton in his Elements of International Law, pt. 2, c. 2; (8th ed.) §§ 96–101. Phillimore, in his Commentaries on International Law, (3d ed.) 476, 479, says: "Long usage and universal custom entitle every such ship to be considered as a part of the State to which she belongs, and to be exempt from any other jurisdiction." "The privilege is extended, by the reason of the thing, to boats, tenders and all appurtenances of a ship of war, but it does not cover offences against the territorial law committed upon shore." And in 1880, Lord Justice Brett, (since Lord Esher, M. R.,) delivering the judgment of the English Court of Appeal, dealing with "the reason of the exemption of ships of war and some other ships," said, "The first case to be considered is, and always will be, *The Exchange*." *The Parlement Belge*, 5 Prob. Div. 197, 208.

In the *Santissima Trinidad*, Mr. Justice Story, speaking for this court, said: "In the case of *The Exchange*, 7 Cranch, 116, the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction." "It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights." 7 Wheat. 283, 352–354.

We find no precedent, either in our own decisions, or in the books of international law, for extending the exemption to an uncompleted ship, or to sailors who have never been on board of her, although intended to become part of her crew when she shall have been completed.

On the contrary, Mr. Hall says that where a ship is bought, or is built and fitted out to order, she is only private property until she is commissioned; and, although invested with minor privileges, such as immunity

from liens of mechanics, she is far, if she be a ship of war, from enjoying the full advantages of a public character. And again: "The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the State for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew, she is merely property; if members of her crew go outside the ship or her tenders or boats, they are liable in every respect to the territorial jurisdiction." Hall's International Law, (4th ed.) 169, 205. So Mr. T. J. Lawrence says: "The immunities of which we have been speaking do not follow the members of the ship's company when they land. In their ship and in its boats, which are appurtenant to it and share its privileges, they are exempt from the local jurisdiction; but the moment they set foot on shore they come under the authority of the State, and may be arrested and tried like other foreigners if they commit crimes or create disturbances." Principles of International Law, (3d ed.) 229.

In *The Exchange*, as has always been recognized by this court, it was treated as well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government, is exempt from the civil and criminal jurisdiction of the place. *Coleman* v. *Tennessee*, 97 U. S. 509, 515; *Dow* v. *Johnson*, 100 U. S. 158, 165. "The grant of a free passage," said Chief Justice Marshall, "implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require." 7 Cranch, 140. That rule, waiving the jurisdiction of the United States over a body of men, and allowing them to be governed, disciplined and punished by their own officers, applies only to an armed force, segregated from the general population of the country, and lawfully passing through or stopping in the country for some definite purpose connected with military operations.

This is no such case. This was a squad of men intended, indeed, at some time in the future, to become part of the crew of a ship of war. But they were not yet part of that crew, and were, for six months before the desertion, quartered on shore in the midst of a large city, and were as yet engaged in performing no military or naval duty, beyond the fact that Alexandroff attended the others when sick. The suggestion of the majority of the court that Alexandroff and his associates were sent out by the Russian Government "to take possession of the Variag" must be founded on the statement (which is all that the record contains on the subject) that they were sent out "for the purpose of becoming part of her crew."

The permission to a foreign nation to pass troops or munitions of war through the United States has been granted by the Executive Department

in a few instances, generally by the Secretary of State. 1 Wharton's International Law Digest, § 13. And there are cases collected by Mr. Cushing, in 7 Opinions of Attorneys General, 453, in which the President of the United States has for various purposes acted through the Department of the Treasury or some other department within its appropriate jurisdiction. It is not necessary in this case to consider the full extent of the power of the President in such matters.

The request of the representative of Russia on September 24, 1899, was simply for the admission into the United States of "one officer and fifty-three regular sailors Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's shipyard in Philadelphia, Pennsylvania." And the response of the Secretary of the Treasury, following the terms of the request, stated that instructions had been given to admit them without examination, and not to collect the head tax of one dollar. The other correspondence submitted to this court, and relied on by the petitioner, shows that in June, 1899, the Secretary of the Treasury had given like instructions as to one officer and twenty-nine other sailors; and that, at the request of the Russian Ambassador, in December, 1900, (fourteen months after the arrival of Alexandroff and his associates in this country, and eight months after his desertion,) the Secretary of State and the Secretary of the Treasury gave precisely similar instructions as to a body of two hundred and eleven seamen, and as to another body of two hundred and thirteen seamen, each sent out to complete the crew of the Variag. It thus appears that Alexandroff and his associates, with the previous detail of thirty persons, together constituted less than one sixth of the intended crew of the Variag.

Moreover, all the letters of the Secretary of the Treasury, and of the Secretary of State, show nothing more than an admission into the United States without examination, and an exemption from the head tax, of persons intended to become part of the crew of the cruiser Variag. These persons, coming into the United States for a temporary purpose only, were clearly not immigrants, nor liable to the head tax upon immigrants. A like admission and exemption would apply to any civilians employed by the Russian Government and coming here temporarily in its service.

It is impossible, therefore, to imply such a waiver of the jurisdiction of the United States over them, as in the case of a foreign army marching through or stationed in the United States by consent of the Government. And even permission to march a foreign armed force through the country does not imply a duty to arrest deserters from that force.

The question in this case is not one of the mere exemption of Alexandroff from the jurisdiction of the government and the courts of the

United States. The question is whether the courts and magistrates of the United States are authorized to exercise affirmative jurisdiction to enforce the control of the Russian authorities over him, after he has escaped from their custody, and to restore him to their control, so that he may be returned to Russia and be there subjected to such punishment as the laws of that country impose upon deserters.

Nations do not generally, at the present day, agree to deliver up to each other deserters from a military force. But it is usual, in order to prevent the ships of war or the merchant vessels of one country from being rendered unfit for navigation by the desertion of their seamen in the ports of another country, to provide by treaty or convention that the authorities of the latter country, upon the application of a consul of the former, should afford assistance in the arrest and detention, and the return to their ships, of seamen deserting from a vessel of either class. 1 Ortolan, Diplomatie de la Mer, (4th ed.) 312, 313; 2 Calvo, Droit International, (5th ed.) §§ 1072, 1073; 1 Phillimore on International Law, (3d ed.) 547, 685; Wheaton on International Law, (8th ed.) 178 note; 1 Moore on Extradition, c. 19.

The United States have made from time to time such treaties with many nations, (a list of which is in the margin,*) containing provisions in almost every instance substantially like that of the treaty with Russia of 1832, except that some of them apply only to merchant vessels.

By the Consular Convention with France of November 14, 1788, before the adoption of the Constitution, consuls and vice-consuls were authorized

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*Austria. May 8, 1848; 9 Stat. 946. July 11, 1870; 17 Stat. 828.

Belgium. November 10, 1845; 8 Stat. 612. December 5, 1868; 16 Stat. 761. March 9, 1880; 21 Stat. 781.

Bolivia. May 13, 1858; 12 Stat. 1020.

Brazil. December 12, 1828; 8 Stat. 397.

Central America. December 5, 1825; 8 Stat. 336.

Chile. May 16, 1832; 8 Stat. 440.

Colombia. October 3, 1824; 8 Stat. 318.

Congo. January 24, 1891; 27 Stat. 930.

Denmark. July 11, 1861; 13 Stat. 606.

Dominican Republic. February 8, 1867; 15 Stat. 488.

Ecuador. June 13, 1839; 8 Stat. 548.

France. November 14, 1788; 8 Stat. 112. June 24, 1822; 8 Stat. 280. February 23, 1853; 10 Stat. 997.

German Empire. December 11, 1871; 17 Stat. 929.

Great Britain. June 3, 1892; 27 Stat. 961.

Greece. December 22, 1837; 8 Stat. 504.

Guatemala. March 3, 1849; 10 Stat. 887.

Hanover. May 20, 1840; 8 Stat. 556.

Hanseatic Republics. June 4, 1828; 8 Stat. 386.

Hawaiian Islands. December 20, 1849; 9 Stat. 980.

Hayti. November 3, 1864; 13 Stat. 727.

to cause the arrest of "the captains, officers, mariners, sailors and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country." 8 Stat. 112. That convention was abrogated by the act of July 7, 1798, c. 67. 1 Stat. 578. But a similar provision was made by the Convention with France of June 24, 1822. 8 Stat. 280. And that provision was carried into effect by the act of May 4, 1826, c. 36. 4 Stat. 160.

The first general statute on the subject was the act of March 2, 1829, c. 41, (4 Stat. 359,) which, as amended by the act of February 24, 1855, (10 Stat. 614,) by allowing United States commissioners to act in the matter, is embodied in section 5280 of the Revised Statutes, under which the application in this case was made, and which applies only to "any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting."

The Varing, at the time of Alexandroff's desertion, was indeed, in one sense, a ship, because she had been launched and was waterborne. And, by the terms of the contract under which she was being built, the legal title in her, as fast as constructed, had vested in the Russian Government, so that, without regard to the question whether she was a ship of war, she could not have been subjected to private suit *in rem* in admiralty. *The Parlement Belge*, 5 Prob. Div. 197. But she had not been completed,

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ITALY. February 8, 1868; 15 Stat. 610. May 8, 1878; 20 Stat. 730.
JAPAN. November 22, 1894; 29 Stat. 852.
MADAGASCAR. February 14, 1867; 15 Stat. 493
MECKLENBURG-SCHWERIN. December 9, 1847; 9 Stat. 917.
MEXICO. April 5, 1831; 8 Stat. 424.
NETHERLANDS. May 23, 1878; 21 Stat. 668.
NEW GRANADA. December 12, 1846; 9 Stat. 896. May 4, 1850; 10 Stat. 904.
OLDENBURG. March 10, 1847; 9 Stat. 868.
PERU-BOLIVIA. November 30, 1836; 8 Stat. 494.
PERU. July 26, 1851; 10 Stat. 944. September 6, 1870; 18 Stat. 714. August 31, 1887; 25 Stat. 1460.
PORTUGAL. August 26, 1840; 8 Stat. 566.
PRUSSIA. May 1, 1828; 8 Stat. 382.
ROUMANIA. June 17, 1881; 23 Stat. 714.
RUSSIA. December 18, 1832; 8 Stat. 448.
SALVADOR. December 6, 1870; 18 Stat. 744.
SAN SALVADOR. January 2, 1850; 10 Stat. 897.
SARDINIA. November 26, 1838; 8 Stat. 518.
SPAIN. February 22, 1819; 8 Stat. 262.
SWEDEN AND NORWAY. July 4, 1827; 8 Stat. 352.
TONGA. October 2, 1886; 25 Stat. 1442.
TWO SICILIES. December 1, 1845; 9 Stat. 838. October 1, 1855; 11 Stat. 651.
VENEZUELA. August 27, 1860; 12 Stat. 1158.

and was in the custody of the contractors, and their men were still at work upon her; by the express terms of the contract, she might still be rejected by the Russian Government, and remained at the risk of the contractors until that government had accepted her or taken actual possession of her; and she had not been fully paid for. She was not equipped for sea, and never had any part of her crew on board, and she had never been accepted, or taken actual possession of, by the Russian Government. Alexandroff and his associates were a squad of men, sent out six months before by the Russian Government for the purpose of becoming part of her crew, and received wages as members of the Russian Navy. But they had never become part of an organized crew, or done any naval or military duty, or been on board of her, or been ordered on board of her; for the whole six months they had lived together on shore; and no regular ship's roll, or other official document, was produced showing that they had actually become part of the crew of the Variag.

The treaty with Russia of 1832 speaks of "deserters from the ships of war and merchant vessels of their country;" and section 5280 of the Revised Statutes speaks of persons who have "deserted from a vessel of any such government;" each applying only to those who desert from a ship. Both the treaty and the statute require proof to be made by exhibition of the register of the vessel, ship's roll or other official document, that the deserter, at the time of his desertion, belonged to, or formed part of, her crew. And the provision of the treaty for the detention of the deserters until "they shall be restored to the vessels to which they belonged, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever," necessarily implies that they belong to a completed vessel upon which they could remain from day to day, and the departure of which may require them to be sent back by another vessel. The object of both treaty and statute, as of the treaties with other nations upon the same subject, was not to encourage shipbuilding for foreign nations in the ports of the United States, or to cover unfinished ships and preparations for manning them when finished; but it was to secure the continued capacity for navigation of ships already completely built, equipped and manned. Both treaty and statute look to a complete ship, and to an organized crew; and neither can reasonably be applied to a ship which has never been completed, or made ready to receive a crew, or had any roll or list of them, or to men who have never been on board the ship as part of her crew. Moreover, the Russian Government, as is admitted, had never accepted or taken possession of the ship, and, by the terms of the contract under which she was building, still had the right to reject her. So long as they had that right, no body of men could be considered as actually part of her crew, whatever they might have been after her acceptance. The evident intent of the statute, as of the treaty, is to afford a remedy

for the common case of sailors deserting their ship, on her coming into port, at the risk of leaving her with no sufficient crew to continue her voyage; and not to the case of a ship which has never been completed, or equipped for sea, or to persons collected together on shore for an indefinite period, doing no naval duty, though intended ultimately to become part of her crew.

The various treaties of the United States with foreign nations apply in a few instances, as in the treaties with Spain of 1819, and with Great Britain of 1892, to merchant vessels only, but, for the most part, as in the treaty with Russia, to both ships of war and merchant vessels. When they apply to both, (except in the treaties with Peru,) deserters from ships of war are put upon the same footing with deserters from merchant vessels; and no greater authority is given to arrest and surrender in the case of the one than in that of the other. Could it be contended that the authority should be extended to the case of sailors who had been collected together on shore for the purpose of becoming, in the future, part of the crew of a merchantman still in the course of construction, and not yet ready to receive them?

The statutes regulating the contract between the owner of a merchantman and his sailors do not appear to us to have any bearing upon the construction and effect of this treaty. Those statutes relate to seamen who, by their shipping articles, have agreed to render themselves on board at a certain time, and to their right to compensation and liability to punishment, or to forfeiture of wages, after that time. Rev. Stat. §§ 4522, 4524, 4527, 4528, 4558; Act of December 21, 1898, c. 28, §§ 2, 9; 30 Stat. 755, 757. And section 4599 of the Revised Statutes (repealed by section 25 of the act of 1898) provided for the arrest and detention, by police officers, of any seaman, having signed such articles, who "neglects or refuses to join, or deserts from or refuses to proceed to sea in" his vessel. The clause "neglects or refuses to join" would have been superfluous if legally included in the word "deserts." The treaty contains no such clause.

The treaty, as already stated, requires the fact that the deserter was part of the crew of the vessel to be proved by the exhibition of the register of the vessel, the roll of the crew, or other official document. Attorney General Black was of opinion that an exhibition of the original ship's roll, or a corresponding document containing the names of the whole crew, was essential, and could not be supplied by a copy of an extract from the roll, containing the deserter's name; and said: "It might be convenient, in cases like this, to dispense with the production of the original document, and let the rights of the person claimed as a deserter depend on the mere certificate of a consul; but a written compact between two nations is not to be set aside for a shade or two of convenience more or less." 9 Opinions of Attorneys General, 96. However that may be, in this case there is no

pretence that the Variag had, or was in a condition to have, any roll or list of her crew; and at the hearing it was not admitted that there was any such roll or list, or that Alexandroff was a member of her crew, but only that he was a member of the Russian Navy, sent out for the purpose of becoming part of her crew. The treaty cannot be construed as extending to the case of a ship which has never been completed, or ready to receive her crew, or had any roll or list of the crew; or to a small part of the men, ultimately intended to form part of her crew, who have never been such, nor ever been on board, but have remained for six months on shore, doing no naval duty.

Moreover, it being quite clear, and indeed hardly denied, that the Variag, in her existing condition, was not a Russian ship of war exempt from the jurisdiction of the United States and subject to the exclusive jurisdiction of her own country, it would seem necessarily to follow that she was not a ship of war in the sense that the authorities of the United States could take affirmative action to enforce the jurisdiction of that country over her or over the men intended to become part of her crew.

The necessary conclusion is that neither the treaty with Russia of 1832, nor section 5280 of the Revised Statutes, gave any authority to the United States commissioner to issue the warrant of commitment of Alexandroff.

It was argued, however, at the bar, that, if this case did not come within the treaty or the statute, the United States were bound, by the comity of nations, to take active steps for the arrest of Alexandroff, and for his surrender to the Russian authorities. But this position cannot be maintained.

The treaties of the United States with Russia and with most of the nations of the world must be considered as defining and limiting the authority of the government of the United States to take active steps for the arrest and surrender of deserting seamen.

These treaties must be construed so as to carry out, in the utmost good faith, the stipulations therein made with foreign nations. But neither the executive nor the judiciary of the United States has authority to take affirmative action, beyond the fair scope of the provisions of the treaty, to subject persons within the territory of the United States to the jurisdiction of another nation.

The practice of the Executive Department, from the beginning, shows that such authority does not exist, in the absence of express treaty or statute. The precedents on the subject are collected in 1 Moore on Extradition, §§ 408–411, and we have examined the archives of the Department of State, to which upon such a subject we are at liberty to refer. *Jones* v. *United States*, 137 U. S. 202, 216; *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *The Paquete Habana*, 175 U. S. 677, 696.

In 1802, in the administration of President Jefferson, the British Chargé d'Affaires complained to Mr. Madison, Secretary of State, of the refusal of the collector of customs at Norfolk in Virginia to cause a seaman, who had deserted from a British ship of war, to be surrendered, on an application made by her captain, through the British consul at that port. Mr. Madison answered: "It need not be observed to you, Sir, that a delivery in such cases is not required by the law of nations, and that in the treaty of 1794 the parties have forborne to extend to such cases the stipulated right to demand their respective citizens and subjects. It follows that the effect of applications in such cases must depend on the local laws existing on each side. It is not known that those in Great Britain contain any provisions for the delivery of seamen deserting from American ships. It is rather presumed that the law would there immediately interpose its defence against a compulsive recovery of deserters. In some of the individual States the law is probably similar to that of Great Britain. In others it is understood that the recovery of seamen deserting from foreign vessels can be effected by legal process." And, after stating that there was no law for their recovery in Virginia, he concluded: "This view of the subject necessarily determines that the President cannot interpose the orders which are wished, however sensible he may be of the beneficial influence which friendly and reciprocal restorations of seamen could not fail to have on the commerce and confidence which he wishes to see cherished between the two nations." 14 MSS. Domestic Letters, 89, in Department of State.

In 1815, in the administration of President Madison, the British Minister having requested the interposition of the Government of the United States to cause the delivery of seamen who had deserted from a British ship of war, Mr. Monroe, Secretary of State, answered: "I regret that there is no mode in which this government can interpose to accomplish the object you have in view. Neither the laws of the United States nor the laws of nations have provided for the arrest or detention of deserters from the vessels of a friendly power. It is hoped, however, that this is one of the subjects which may hereafter be satisfactorily arranged by treaty between the two nations." 1 Moore, § 408.

In 1846, in President Polk's administration, the British Minister applied for the surrender of a seaman who had deserted from a British ship of war, and was serving on a war vessel of the United States; and Mr. Buchanan, Secretary of State, replied: "Your communication has been submitted to the President; and I am instructed to express his regret that he cannot comply with your request. The case of deserters from the vessels of war of the respective nations is not embraced by the tenth article of the treaty of Washington providing for extradition in certain cases; and without a treaty stipulation to this effect, the President does not possess the power

to deliver up such deserters. The United States have treaties with several nations which confer upon him this power; but none such exists with Great Britain." 7 MSS. Notes to Great Britain, 147, in Department of State.

In September, 1864, in the administration of President Lincoln, while the United States steamship Iroquois was lying in the Downs, three of her seamen deserted. They were arrested on complaint of the United States consular agent, brought before a police magistrate at Dover, and discharged by him, on the ground that, as they had violated no law of England, there was no authority for their arrest and detention. Upon the matter being brought by Mr. Adams, the American Minister, to the attention of the British Government, Lord Russell replied "that there is no law in force in this country by which these deserters could be given up." 1 Moore, § 409; Dip. Cor. 1864, pt. 2, 336.

In July, 1864, Lord Lyons, the British Minister, submitted to Mr. Seward, Secretary of State, a statement that two apprentices, employed on board the British barque Cuzco, had deserted at Valparaiso and enlisted on a United States ship of war; and asked for an investigation. On December 4, 1864, Mr. Seward communicated the results of the investigation to the British Chargé d'Affaires; and informed him that, owing to the action of the British government in the case of the deserters from the Iroquois, the United States did not deem themselves under either a legal or a moral obligation to deliver up the deserters from the Cuzco. On February 23, 1865, the British Chargé d'Affaires, by instructions from his government, replied that it was unable to follow the principle or reason of the resolution of the United States Government, and insisted that "it is in the power of the naval officers of the United States (as it would be in that of Her Majesty's naval officers in a like case) to deliver up on the high seas, or in any foreign port, under the instructions of their government, deserters from foreign vessels who may without lawful authority be found on board one of the ships of war of the United States;" but he distinctly admitted and asserted: "But when a foreign deserter is on shore in Great Britain, (and her Majesty's government presume the case would be the same in the United States,) the power of her Majesty's naval officers and of her Majesty's government itself over him is at an end; he can then only be detained or delivered up for some cause authorized by the law of the land." The case was not further pursued. 1 Moore, § 409, and note.

The earliest treaty between the United States and Great Britain on the subject is that of June 2, 1892, which applies only to merchant seamen, being limited to "seamen who may desert from any ship belonging to a citizen or subject of their respective countries." 27 Stat. 961.

The first treaty with Denmark on the subject is that of July 11, 1881, concerning "deserters from the ships of war and merchant vessels of their country." 13 Stat. 606. In 1853, in the administration of President Pierce, on a question of the arrest of a deserter from a Danish ship and his discharge by the authorities in New York, (the treaties between the United States and Denmark not then containing any stipulation for the restoration of deserting seamen,) Mr. Cushing, as Attorney General, gave an opinion to Mr. Marcy, Secretary of State, that without such a treaty the executive or judicial authorities of the United States had no power to arrest, detain and deliver up a Danish mariner on the demand of the consul or other agents of Denmark, and said: "The summary arrest and delivery up of deserters from the service of other nations, like the surrender of fugitives from their criminal justice, when found in the territory of a country into which they have escaped or fled, is not a duty absolutely enjoined by the law of nations, but a subject of special convention. So also are the authority and jurisdiction of consuls and commercial agents in regard to demanding and superintending the arrest, detention and surrender, either of deserters from service or fugitives from justice." 6 Opinions of Attorneys General, 148, 154.

This uninterrupted course of action of the Executive Department, beginning almost a century ago, must be considered as conclusively establishing that, independently of a treaty, no international obligation exists to surrender foreign seamen who have deserted in this country.

It is hardly necessary to add that the suggestion of the District Attorney can have no effect, other than to call the attention of the court to the facts of the record. The question whether those facts justified the commitment of the prisoner by the United States commissioner is a question to be decided, not by the Executive Department or by any of its officers, but by the courts of justice.

According to our view of the facts, and for the reasons and upon the authorities above stated, we are of opinion that the commissioner had no authority to commit the prisoner, that his imprisonment was unlawful, and that he is entitled to be discharged.

True copy.

Test

Clerk Supreme Court, U. S.